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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

RELIABLE TRANSFER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
HARRY R. SACHSE,
Assistant to the Solicitor General,
WILLIAM KANTER,
RICHARD A. OLDERMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 497 F. 2d 1036. The memorandum and order of the district court (App. B, *infra*) is unreported.[1]

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*) was entered on May 23, 1974. On August 13,

[1] We have not reproduced the unreported decision and order of the district court dated February 7, 1973 assessing the dollar value of the damages in accordance with the memorandum and order reproduced as App. B, *infra*.

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1974, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Marshall to and including October 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admiralty rule of equally divided damages currently applied in collision cases should be replaced by the rule of damages in proportion to fault.

STATEMENT

The facts are not in dispute and are set forth in the opinion of the district court (App. B, *infra,* pp. 12–20).

The vessel *Mary A. Whalen,* owned by respondent, Reliable Transfer Co., left Constable Hook, New Jersey, on December 23, 1968, taking a course that led her through the 400-yard-wide Rockaway Inlet en route to her destination at Island Park, New York. The Inlet lies between a breakwater to the east and the shore to the west. The breakwater is marked at its southern terminus by the Rockaway Point breakwater light, which is maintained by the Coast Guard and is usually visible for four miles. On the night of the *Mary A. Whalen*'s journey this light was not functioning.

While negotiating the Inlet, the Captain of the *Mary A. Whalen* negligently maneuvered to pass a fast-moving barge ahead of his vessel. Failing to overtake the barge, the Captain, without proper precaution, made a U-turn, passed behind the barge, and set off on an easterly course. A minute thereafter an object loomed in front of his craft. This proved to be

the Rockaway Point light structure on the breakwater. Swerving to avoid the rocks, the Captain ran the ship aground.

Thereafter respondent filed suit against the United States in the district court pursuant to the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.,* seeking recompense for damages sustained by its vessel by reason of the grounding.

The district court found that the grounding was caused 25 percent by the Coast Guard's failure to maintain the breakwater light but 75 percent by the Captain's negligence in failing to check his position before setting his vessel on a new course. "Equipped with look-out, chart, searchlight, radio-telephone, and radar," wrote the court, "[the captain] made use of nothing except his own guesswork judgment" (App. B, *infra,* p. 19). The court held, however, that the admiralty rule of divided damages dictated that each party bear one-half of the losses, noting that "[w]hile division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent" (App. B, *infra,* p. 22).

The court of appeals affirmed the factual findings of the district court and the division of damages, stating that while it is "mindful of the criticism of the equal division of damages rule" it prefers "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress" (App. A, *infra,* p. 11).

REASONS FOR GRANTING THE WRIT

1. This case presents in clear form the important question of whether the American admiralty rule of divided damages should be overruled. The divided damages rule, a court-made rule, is now contrary to the rule of every major sea-going nation and has been criticized by doctrinal writers and major admiralty courts within this country (see discussion *infra*). The rule provides that in collision cases where mutual fault is shown the damages are to be divided equally regardless of the degree of fault of each party. This Court granted certiorari in *Union Oil Co. of California* v. *The San Jacinto,* 409 U.S. 140, principally to consider the continued appropriateness of the rule (see Justice Stewart's dissent, 409 U.S. at 150) but failed to reach the issue when a finding was made absolving one of the vessels from fault.

The present case squarely presents the issue for resolution.

2. The divided damages rule should be abandoned in favor of a rule which would apportion damages on the basis of the relative fault of the parties.

The divided damages rule was adopted by this Court in *The Schooner Catharine* v. *Dickinson,* 17 How. 170, as an amelioration of the common law rule forbidding recovery to one contributorily negligent. It has been followed in collision cases for over 100 years[2] and

[2] See, *e.g.*, *The Washington and The Gregory*, 9 Wall. 513; *The North Star*, 106 U.S. 17; *The Chattahoochee*, 173 U.S. 540; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; *Weyerhaeuser SS. Co.* v. *United States*, 372 U.S. 597.

has been extended to cases such as this, where a vessel has gone aground. *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.,* 258 U.S. 341. The rule, however, works poorly where one party's negligence is considerably greater than the other. The instant case is an example of this. Despite a clear finding that the United States bore at most 25% of the fault, it was ordered to pay 50% of the damages.

The lower federal courts have criticised the rule as "unjust and arbitrary,"[3] "[an] ancient rule which has been abrogated by nearly all civilized nations"[4]

[3] *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F. 2d 485, 488 (C.A. 3): "The rule of equal division of damages appears to have been founded upon the difficulty of determining, when both vessels were at fault, the degree of negligence in the one and the other. It was *judicium rusticum*, a sort of rough and ready rustic justice applied to the sea. The Max Morris, 1890, 137 U.S. 1, 12, 11 S.Ct. 29, 34 L.Ed. 586. When the faults are roughly equal the operation of the rule is just and satisfactory enough. Where, however, the fault of one vessel is palpably major and that of the other extremely minor the obvious injustice of the application of the rule of equal division of damages has led the courts to avoid it by glozing and ignoring the minor fault and imposing sole responsibility upon the vessel gravely at fault, as was done in some of the cases upon which the appellant here relies. But to ameriolate the unjust effect of one arbitrary rule by applying another which is equally arbitrary seems hardly the way to promote justice and reach an equitable result. How much better it would be to apply, in cases where it was feasible to do so, a rule of comparative fault analogous to that now applied in the admiralty in cases of personal injuries."

[4] *National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (Learned Hand dissenting) (C.A. 2), certiorari denied *sub nom. Burns Steamship Co.* v. *National Bulk Carriers, Inc.*, 340 U.S. 865.

and "unfair."[5] They have, however, felt constrained to follow it.[6]

This Court itself has recognized the rule's potential for producing inequitable results by establishing the so-called "major-minor" rule which provides that where a vessel is guilty of gross misconduct it will be held fully liable for damages, even where the other vessel has also been negligent. *The City of New York,* 147 U.S. 72; *The Umbria,* 166 U.S. 404. The "major-minor" rule, however, applies in only a few cases, and itself subjects vessels to liability in excess of their fault. In the words of Learned Hand it is "in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." *National Bulk Carriers, supra,* n. 4, 183 F. 2d at 410. The two rules together do not achieve the equity of the rule of proportional damages.

This Court has rejected the application of the equal division rule in admiralty personal injury cases, in favor of proportional fault, holding that by virtue of its traditional discretion, admiralty allows such consideration of contributory negligence in mitigation of

[5] *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F. 2d 618, 620 (C.A. 2).

[6] There have been exceptions. The Court of Appeals for the Third Circuit in *The Margaret*, 30 F. 2d 923, actually allocated damages in proportion to fault, but modified its order on rehearing to conform with the Supreme Court rule. The Second Circuit acted more boldly in *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, where it affirmed without comment the district court's 60–40 apportionment of damages (135 F. Supp. 371 (E.D.N.Y.)).

damages "as justice requires." *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 409. The same principles of equity prompting that decision are applicable here.

3. Although the divided damage rule has its roots in English and French jurisprudence[7] these countries long ago abandoned it for liability in proportion to fault, and the United States is today the only major seafaring nation which follows the rule.[8] The isolated maintenance of the divided damages rule by this country thus encourages trans-oceanic forum shopping and is another reason for abandonment of the rule

[7] The antecedents of the rule are discussed fully in *The North Star*, 106 U.S. 17, 20–22, and *The Max Morris*, 137 U.S. 1, 12–13.

[8] While there was considerable divergence in the apportionment of damages in the 19th Century all major sea-faring nations except the United States have now ascribed to the Brussels Convention of 1910 (International Convention for the Unification of Certain Rules to Govern the Liability of Vessels When Collisions Occur Between Them), which, among other things, provides for proportional liability. See 6 Knauth's *Benedict on Admiralty* (7th ed., rev.), pp. 37 *et seq.*, for the text of the Convention and a list of the ascribing nations. For a discussion of the reasons why the United States did not ratify the Convention—reasons concerned with disagreement as to the handling of cargo claims, not proportional liability between vessels—see Comment, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgage*, 64 Yale L.J. 878 (1955). The part of the Convention pertinent here (in the congressional translation quoted by Knauth, p. 39), states, with considerable clarity:

Art. 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

Isbrandtsen Co. v. *Lloyd Brasiliero,* 85 F. Supp. 740 (E.D.N.Y.); Gilmore and Black, *The Law of Admiralty,* Sec. 7–20, p. 439 (1957 ed.).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.
WILLIAM KANTER,
RICHARD A. OLDERMAN,
Attorneys.

SEPTEMBER 1974.

APPENDIX A

United States Court of Appeals
for the Second Circuit

RELIABLE TRANSFER CO., INC.
v.
UNITED STATES OF AMERICA

PER CURIAM:

This case arises from a little saga of the sea—this time involving a coastal tanker, the Mary A. Whalen, that got lost in the waters just outside New York harbor on a clear night in December 1968 when the seas were rough, the tide was running strong and a breakwater light maintained by the Coast Guard was out. The tanker ended up stranded on a sand bar off Rockaway Point.

The owner of the tanker, Reliable Transfer Co., Inc., invoking the admiralty and maritime jurisdiction of the district court under the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq. (1970), sued the United States to recover damages sustained by the stranded tanker.

After a bench trial in the Eastern District of New York before Orrin G. Judd, *District Judge,* the court found that the stranding of the tanker was caused 25% by the negligence of the Coast Guard in its failure properly to maintain the breakwater light and 75% by the negligence of the vessel in making a U-turn in a dangerous channel when its captain knew that the breakwater light was not operating. The court

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held under controlling law that each party should bear half of the damages.

We hold that the court was not clearly erroneous in finding that the negligence of both parties, in the proportions stated, caused the stranding.

The vessel's claim that it was not at fault borders on the frivolous; under circumstances requiring extreme care in navigation and with adequate navigation instruments available, the captain simply got lost and was considerably further north than he thought when he made a U-turn in a dangerous channel knowing that the breakwater light was not operating.

We also reject the government's claim that its failure properly to maintain the breakwater light was merely a condition rather than a cause of the stranding. Surely it was a but-for cause. The court found, as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel. Viewing the government's claim as essentially a variation of the last clear chance doctrine—given the captain's knowledge of the dangerous situation, he should have been able to avoid the stranding—we refuse to apply here the doctrine of last clear chance which has been given only limited application in admiralty. See *Petition of Kinsman Transit Co.*, 338 F. 2d 708, 719–21 (2 Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

We also decline the invitation to seize upon this case as a vehicle to overrule the equal division of property damage rule that has long applied in admiralty cases where both parties are at fault. *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, 603 (1963); *The Max Morris*, 137 U.S. 1, 13 (1890); *North Star*, 106 U.S. 17 (1882). And we particularly see no basis either in authority or in principle for saying that the

rule should apply in collision cases but not in stranding cases; for it was so applied in *Atlee* v. *Northwestern Union Packet Co.*, 88 U.S. (21 Wall.) 389 (1874). We of course are mindful of the criticism of the equal division of damages rule and we recognize the force of the argument that in this type of case division of damages in proportion to the degree of fault may be more equitable. *Ulster Oil Transport Corp.* v. *The Matton No. 20*, 210 F. 2d 106, 110 (2 Cir. 1954) (L. Hand, *J.*, dissenting); Black & Gilmore, Admiralty § 7–20, at 440 (1957). But we also are not insensitive to the considerations rooted in strong public policy that have impelled our Court as one of the inferior federal courts for many years to abstain from attempting to change the law in areas such as this, preferring to leave doctrinal development to the Supreme Court or to await appropriate action by Congress. *In re Adams' Petition*, 237 F. 2d 884, 887 (2 Cir. 1956); cf. *McLaughlin* v. *Trelleborgs Augfartygs A/B*, 408 F. 2d 1334, 1338 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969); *Benazet* v. *Atlantic Coast Line Railroad Co.*, 442 F. 2d 694, 697 (2 Cir. 1971), *aff'd*, 406 U.S. 340 (1972). As Judge Hincks so aptly put it in *In re Adams' Petition, supra*, 237 F. 2d at 887:

> "[T]he rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom."

We agree.

We affirm substantially for the reasons set forth in the well reasoned opinion of Judge Judd below. —— F. Supp. —— (E.D.N.Y. 1973).

Affirmed.

APPENDIX B

United States District Court Eastern District of New York

70–C–282, April 20, 1972

RELIABLE TRANSFER CO., INC.

against

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

JUDD, J.

This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding.

THE FACTS

The *Mary A. Whalen,* one of plaintiff's oil tankers, took a full load of fuel oil on December 23, 1968 at Constable Hook, New Jersey, and began a voyage at 7:20 p.m. to a distributor at Island Park, Long Island. The *Whalen* was 166 feet long, 31 feet wide and loaded to a draft of 12 feet. She was equipped with gyro and

magnetic compasses, a searchlight having a range of half a mile, radar, radio direction finder, ship-to-shore radio, and a fathometer. She had a chart of the area, which was one year old and did not reflect the fact that the color of the Rockaway Point breakwater light had been changed from red to white.

The *Whalen*'s captain, John E. Lindroth, had not listened to the Coast Guard broadcast at 7:20 a.m., which reported that the Rockaway Inlet breakwater light was not operating. The Coast Guard's evening broadcast at 7:20 p.m. did not repeat this information, and this also was not heard by Captain Lindroth.

The wind on the evening of December 23 was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity. Captain Lindroth was licensed as a pilot for the entire east coast, specifically including Rockaway Inlet and East Rockaway Inlet. He had made the voyage from Constable Hook to Island Park over a thousand times, but this was the first time he had done it in 1968. With him in the wheelhouse were the mate, Stian Larsen and a deckhand, Daniel Wilhelmsen. Larsen was a licensed pilot, but not licensed for the Rockaway Inlet area. Larsen did not require such a license as long as Lindroth was in command. Wilhelmsen was supposed to act as lookout when he was in the wheelhouse. He said that he made no reports to Captain Lindroth because the captain usually sees things before the lookout.

The course from Constable Hook to Island Park goes through New York harbor and the Lower Bay, through the Narrows, under the Verrazano Bridge, easterly from Norton Point through the Coney Island Channel to Rockaway Inlet, southerly through Rockaway Inlet to the ocean, and then easterly along the shore to East Rockaway Inlet. Island Park is about

three and a half miles beyond the entrance of East Rockaway Inlet.

The Rockaway Inlet course begins at a lighted flashing green buoy No. 9 ("G9"). At that point, Lindroth turned the *Whalen* south on a course of 180° on her gyro compass. The easterly side of Rockaway Inlet is marked by the Rockaway Inlet light which has a 13-mile range, the breakwater, the Rockaway Point breakwater light near its southerly tip, and a red bell buoy "R4" about a hundred yards south of the tip. The breakwater light was about 1.1 miles from buoy "G9". The breakwater light was usually visible for about four miles. There was also a lighted flashing red entrance buoy "R2" with a gong about 1,250 yards south of the breakwater. The westerly side of Rockaway Inlet is marked by unlighted buoys "C7", "C5", and a red and black gong buoy ("RB") located about 525 yards southwest by west from the breakwater light. The channel is about 400 yards wide.

After turning southward at "G9" into the southerly part of Rockaway Inlet, Lindroth turned the *Whalen*'s searchlight on the breakwater and buoy "C5". Although it was a windy night, there was 10 miles visibility. Beyond the breakwater was open ocean and an unrestricted horizon. While advancing through the Inlet, Lindroth pointed out the navigational aids to mate Larsen. About a half hour before the stranding, as they came down the Inlet, according to Larsen, "the captain said there was supposed to be a light there on the point but it was out." This observation was confirmed by Wilhelmsen.

The tide was at flood, running about two miles toward the northwest, and thus reducing the speed of the *Whalen,* which normally made about 10 knots. It was doing about 8 knots over the ground. Waves were 8 to 10 feet high.

THE TOW WHICH INTERFERED WITH THE "WHALEN'S" COURSE

When the *Whalen* was in the vicinity of the "RB" gong, the Captain noticed for the first time a barge ahead off the port side. He sent Wilhelmsen down to get coffee, and continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he observed the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge. He turned right from his 180° course to a course of 220° and proceeded southwest for two to four minutes, then turned north to complete a U-turn. When he came astern of the barge, he turned to the right on an easterly course of 73° on his gyro compass. This was the normal course from the entrance of Rockaway Inlet to lead into East Rockaway Inlet. Within a minute, he saw a dark shadow ahead and asked the deckhand to shine the searchlight on it. The shadow proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He turned to the left because there were rocks to the right, and the vessel landed broadside in the sand.

Captain Lindroth made no effort to check his position before adopting the 73° course, except to look for a red light on the breakwater. He did not turn on the radar, which had an accuracy from 25 to 50 feet. He did not use his searchlight to pick up the "R4" buoy or the breakwater, although he had used it before turning from Coney Island channel into Rockaway Inlet. He did not take a fix on the Rockaway

Inlet light, which was 1,450 yards north of the breakwater light, although he had earlier noticed that the breakwater light was out. He left his chart in the drawer. He had not used his radio to check the position and course of the tug before making the U-turn maneuver. Apparently, neither the mate nor the deckhand had reported any observations of lights or buoys. Captain Lindroth testified that it was difficult to see white lights in the heavy sea which was running at the entrance to the Inlet.

There are two alternate courses from Rockaway Inlet to Island Park. The first, which Lindroth was attempting to take, goes through a narrow stretch of deep water between the breakwater and a shoal southeast of the "R4" buoy. The second goes south of the shoal beyond the "R2" buoy before turning easterly. Either course was proper. With the heavy seas in the ocean, the course near shore was a permissible one, if the Captain had been sure that he was south of the breakwater and north of the shoal before turning east.

Captain Lindroth testified on three different occasions, once at a Coast Guard hearing concerning the stranding, again on a deposition taken by the defendant, and a third time at the trial. His description of his sighting of the barge and tug and of his U-turn maneuver differed on each occasion. The court must therefore rely mainly on the physical facts. It is appropriate to accept his testimony on cross-examination at the trial, that the *Whalen* stranded within a minute or two after making her turn to a 73° course. At 8 knots, she would travel about 800 feet in one minute. His testimony at the deposition that the vessel traveled seven minutes on a 73° course is inconsistent with any indicated positions and should not be credited. Captain Lindroth testified that he realized at the time

of the trial that he was too far north to set a 73° course, and said that the flood tide was responsible. In other words, he did not know where he was when he made his fateful turn.

THE REPAIRS OF THE ROCKAWAY BREAKWATER LIGHT

The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.

After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours. Most repairs were made by Boatswain's Mate Frederick H. Lee. He had been in the service for two years and a half, had received six weeks training on maintenance of navigational aids, and had spent eighteen months on a buoy tender before being assigned to the Rockaway station. He first checked the lamp changer, and on December 2 installed a new one. On subsequent visits he changed the flasher, the lamps, the battery cable, and the photoelectric cell. He checked the batteries each time by using a volt meter with the light off and with the light on, keeping the light on for 10 or 15 minutes by holding his hat over the photoelectric cell. The 12-cell battery registered 13.5 volts with the light off and 13 volts with the light on, which represented a normal variation for a load. Lee did not keep the light on for two or three hours, which would have been a more reliable test, to show whether the battery was really sound or whether it had simply recovered temporary strength during the several hours of rest which it would have during each day-time period. It would have been

difficult to stay at the light for so long a period on a winter day.

The batteries had an expected life of 400 days. Having last been replaced in June 1968, they were not due for replacement until September 1969. However, the previous batteries had lasted only three months, having been put in place on March 20, 1968 and replaced on June 20, 1968. On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly.

On only one of the occasions in December when the light was reported out did the Coast Guard follow up its repairs with any night-time inspection to see whether the repairs were effective. On December 10th, Electrician's Mate Cable made a visual inspection from the beach between 10:00 and 11:00 o'clock and found the light watching properly. The light could not be seen overland from the nearest Coast Guard station, but there was at least one 44 foot Coast Guard cutter which could have been used for observation from Rockaway Inlet if access to the beach was not feasible.

There never had been so many successive outages of one light in the Rockaway Coast Guard area.

CONCLUSIONS OF FACT

The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation. This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours.

A night-time verification of the success of the repairs was essential after routine efforts had proved

futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd. Lee was a competent man, but the circumstances called for active supervision. Since December 23rd was the last working night before the long Christmas weekend, a proper concern for mariners on a lee shore in a gale should have prompted a responsible officer to verify the flashing of the light on that evening.

The voice warnings to mariners were inadequate and misleading—inadequate because they did not mention that the light had proved undependable during most of December, and misleading because they were not repeated in the evening, in spite of the lesson of experience that prior repairs had not been permanent.

The fault of the vessel was more egregious than the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow space between bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. Obviously, he would not have found the breakwater light looming directly ahead of him within a minute after his change of course, if he had not been north of the point where he believed he was.

Equipped with look-out, chart, searchlight, radiotelephone, and radar, he made use of nothing except his own guesswork judgment. After sighting the tug and tow, making his westward turn to a 220° course and turning in a loop toward the north so as to pass astern of the tow, he should have made sure of his position before setting his new 73° course. The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. The Captain's failure to hear the horn

which was adjacent to the breakwater light may be excused by the noise of the storm, but the responsibility of maneuvering a 165-foot boat in dangerous seas called for much greater attention to all available navigational aids.

Allocation of proportionate fault is not capable of mathematical certainty, but the court's judgment is that 75% of the fault rested with the *Mary Whalen* and its Captain and not more than 25% with the government.

DISCUSSION OF LAW

Only brief discussion of the rules of liability is necessary. The major problem is the division of damages.

Jurisdiction of this court exists under either the Suits in Admiralty Act, 46 U.S.C. §§ 740–52 or the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *Russell, Poling & Co.* v. *United States,* 140 F. Supp. 890 (S.D.N.Y. 1956).

The government's liability for the negligent misplacement or non-functioning of navigational aids has been firmly recognized. The Coast Guard may establish and maintain aids to navigation. 14 U.S.C. § 81. Once such aids are established, 14 U.S.C. § 2 requires that they be maintained in proper order and position. *Afran Transport Co.* v. *United States,* 309 F. Supp. 650, 654 (S.D.N.Y. 1969), *Indian Towing Co.* v *United States,* 350 U.S. 6, 76 S. Ct. 122 (1955).

New York law, to the extent it may be applicable, imposes a similar liability on the state for negligent maintenance of aids to vehicular traffic. *Foley* v. *State,* 294 N.Y. 275 (1945).

Negligence of a vessel or a mariner may be shown by the government either to deny proximate cause or to constitute a partial defense under the admiralty

rule of dividing damages. *Russell, Poling & Co.* v. *United States, supra,* 140 F. Supp. at 892–94; *Indian Towing Co.* v. *United States,* 182 F. Supp. 264 (E.D. La. 1959), aff'd, 276 F. 2d 300 (5th Cir. 1960).

Plaintiff asserts that the Coast Guard's breach of its statutory duty to maintain the light gives it the benefit of the rule of *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1873), that the violator must prove that his fault could not have been a cause of the accident. *The Pennsylvania* is not applicable here, since both parties have been found at fault—and *The Pennsylvania* divided damages in spite of one party's violation of a statutory duty.

Negligence is basically a question of fact, with no two cases alike. None of the cases cited by plaintiff are close enough to the present one to defeat the court's finding that negligence on the part of the *Whalen* and its captain was a proximate cause of the stranding.

Plaintiff cites *Universe Tankships, Inc.* v. *United States,* 336 F. Supp. 282 (E.D. Pa. 1972), for the argument that the *Mary Whalen* was guilty of no negligence and that all the fault should be placed on the Coast Guard. That was a different case, however; the buoy marking a turn in the river had been placed in a wrong position by Coast Guard personnel and the court found on the facts that there was no negligence on the part of the vessel or its master in failing to note the misplacement of the buoy. There was no evidence in *Universe Tankships* that the vessel failed to utilize other means available to ascertain her true position.

The principle that total blame need not be placed on the United States for failure of a navigational aid is illustrated by *Philadelphia Electric Co.* v. *Curtis Bay Towing Co.,* 260 F. Supp. 505 (E.D. Pa. 1966),

aff'd, 390 F. 2d 125 (3d Cir. 1968), where it was held that the ship should have realized that a buoy was clearly out of place, and *Hamburger* v. *United States,* 318 F. Supp. 103 (D. Md. 1970), where it was held that checking the pertinent chart would have shown that the particular light was not operating.

DIVISION OF DAMAGES

The rule of equal division of damages has long applied in admiralty cases where both parties are at fault. While division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent.

Proportionate division of damages in admiralty personal injury cases has become the law in this circuit. *Ahlgren* v. *Red Star Towing & Transp. Co.,* 214 F. 2d 618, 621 (2d Cir. 1954). In a personal injury claim arising from a collision between a sailboat and a tanker, it was held proper to charge the jury that if both parties were negligent, the jury should decrease the amount of plaintiff's recovery "by a percentage which would represent the extent to which he was to blame." *Topor-Taparek* v. *Socony Mobil Oil Co., Inc.,* 339 F. 2d 792, 794 (2d Cir. 1964). In Jones Act cases relating to injuries to seamen, within the admiralty jurisdiction, the rule of proportionate negligence applies, but this is by virtue of statute. 49 U.S.C. § 688, 45 U.S.C. § 53. Liability for indemnification for personal injuries in admiralty cases has been based on comparative negligence, as a matter of interpretation of contract, without benefit of statute. *United States* v. *Seckinger,* 397 U.S. 203, 90 S. Ct. 880 (1970). *Cf. Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 74 S. Ct. 202 (1953).

In collision cases, on the other hand, equal division of damages has traditionally been applied. *The North*

Star, 106 U.S. 17, 1 S. Ct. 41 (1882); *The Max Morris,* 137 U.S. 1, 13, 11 S. Ct. 29, 32 (1890); *Weyerhaeuser Steamship Co.* v. *United States,* 372 U.S. 597, 603, 83 S. Ct. 926, 930 (1963).

The Supreme Court stated in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 284, 72 S. Ct. 277, 279 (1952), that the Court had never expressly applied the rule of equal division of damages to non-collision cases. (The holding in *Halcyon* was that an unseaworthy vessel could not obtain contribution from a negligent ship-chandler whose employee was hurt). The rule of equal division of damages had earlier been applied in a case where a vessel sank in a canal due to negligence of both the shipowner and the canal company, a case analogous to the present one. *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.,* 258 U.S. 341, 42 S. Ct. 338 (1922).

Judge Abruzzo of this court once divided damages in a collision case in the proportion of 60% and 40%, and was affirmed in that result by the Court of Appeals. *Marine Fuel Transfer Co.* v. *The Ruth,* 135 F. Supp. 371 (E.D.N.Y. 1955), aff'd, 231 F. 2d 319 (2d Cir. 1956). The issue of unequal division of damages was not mentioned by the Court of Appeals, and may not have been raised by either appellant.

Judge Learned Hand criticized the equal division rule in his dissent in *Ulster Oil Transport Corp.* v. *The Matton No. 20,* 210 F. 2d 106, 110 (2d Cir. 1954), but he was unable to persuade either of his colleagues to join him. A few years later, the court stated that the rule of equal division was too well established for a court of intermediate jurisdiction to deviate from it. *In re Adams' Petition,* 237 F. 2d 884, 887 (2d Cir. 1956), cert. denied, 352 U.S. 971, 77 S. Ct. 364 (1957). Quite recently, the Court of Appeals for this circuit

has reaffirmed the rule of equal division. *In re Seaboard Shipping Corp.*, 449 F. 2d 132, 138 (2d Cir. 1971). Although *Seaboard Shipping* was a tug-tow case, where the court believed that equal contribution to damages produced an equitable result, the decision does not encourage a district court to rely on Judge Abruzzo's case as current authority.

The Seventh Circuit has required equal division in a case involving a collision between a steamer and a bridge, even though there was a finding of fact that the negligence of the steamer was a proximate cause to the extent of two-thirds of the total fault. *N. M. Paterson & Sons, Ltd.* v. *City of Chicago,* 324 F. 2d 254, 258 (7th Cir. 1963).

The "major-minor fault rule" permits disregard of minimal negligence and grant of full damages where one party's fault is relatively overwhelming. *Koch-Ellis Marine Contractors, Inc.* v. *Chemical Barge Lines, Inc.,* 224 F. 2d 115 (5th Cir. 1955). This case is not an appropriate one to apply the "major-minor fault rule," since the fault of each party was substantial.

Under the compulsion of the *Adams* and *Seaboard Shipping* cases, the court must therefore rule that plaintiff shall recover half its damages from the United States of America. A hearing to fix damages will be held on June 19, 1972 unless the parties reach agreement on the dollar amount before that time.

This memorandum is intended to include the court's findings pursuant to F.R. Civ. P. 52(a).

It is ORDERED that plaintiff is entitled to recover from the defendant half its damages as hereafter agreed or determined.

(s) ORRIN G. JUDD,
U.S. District Judge.

APPENDIX C

United States Court of Appeals for the Second Circuit

73–1513, 73–2325

RELIABLE TRANSFER CO., INC., PLAINTIFF-APPELLEE-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT-APPELLEE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of May one thousand nine hundred and seventy-four.

Present: Hon. J. Edward Lumbard, Hon. Henry J. Friendly, Hon. William H. Timbers, Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLEN,
Chief Deputy Clerk.

Supreme Court, U. S.
FILED
JAN 16 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-363

UNITED STATES OF AMERICA,

Petitioner

—v.—

RELIABLE TRANSFER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 30, 1974
CERTIORARI GRANTED NOVEMBER 18, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-363

UNITED STATES OF AMERICA,

Petitioner

—v.—

RELIABLE TRANSFER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Answer of United States of America	13
Order Granting Certiorari	15

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
3- 6-70	COMPLAINT FILED. SUMMONS ISSUED.
3-11-70	Summons returned and filed with Marshall's proof of service thereon. Summons served on defendant, U.S. Atty. General, March 10, 1970.
5- 7-70	BY JUDD, J. Stipulation filed. ORDERED that the time for defendant, U.S.A. to answer, etc., be extended to May 29, 1970. (P/C mailed)
5-27-70	ANSWER filed. (Served May 27, 1970)
6- 4-70	Interrogatories propounded by Pltff. to Deft. filed.
6-15-70	Answers to Interrogatories propounded by Pltff filed.
7-14-70	Plaintiff's NOTICE TO PRODUCE, filed. (Affidavit of mailing annexed dated June 25, 1970)
7-14-70	Deft's Notice of Examination of Pltff by Capt Lindroth filed.
7-22-70	Interrogatories filed to be answered by plaintiff, etc. (propounded by the U.S.A.)
7-23-70	Notice filed of the respondent herein that plaintiff be given an examination on AUGUST 4, 1970 at 2:00 P.M.
7-24-70	Before JUDD, J. Case called. Pre-Trial conference held. Second Pre-Trial Nov. 10, 1970 at 9:30 A.M.
11- 4-70	NOTICE OF MOTION FILED for an order pursuant to Rule 37 of the F.R.C.P., directing the plaintiff, Reliable Transfer Co., Inc., to answer written interrogatories, etc. (returnable Nov. 10, 1970 at 9:30 A.M.)
11- 4-70	Memorandum filed in support of defendant's motion, etc.

DATE	FILINGS-PROCEEDINGS
11- 9-70	NOTICE OF CROSS-MOTION filed by plaintiff, etc. (original motion is on for Nov. 10, 1970 at 9:30 A.M.)
11-10-70	Before JUDD, J. Case called. Pre-Trial conference held in chambers. Second Pre-Trial scheduled for Dec. 2, 1970 at 4:30 P.M.
11-10-70	Before JUDD, J. Case called (CROSS-MOTION) in chambers. Motion granted without opposition. No order need be submitted.
11-10-70	Before JUDD, J. Motion pursuant to Rule 37, etc. Case called. Motion argued. Decision Reserved.
11-10-70	Answers of plaintiff filed to the interrogatories addressed by the defendant.
11-12-70	Affidavit of Janis G. Schuimeisters, attorney in the Admiralty and Shipping Section of the U.S. Dept. of Justice filed.
12- 2-70	Notice of U.S. Atty., filed re taking of deposition of plaintiff herein December 10, 1970 at 10:30 A.M.
12- 2-70	Before JUDD, J. Pre-Trial conference held. Second Pre-Trial scheduled for March 22, 1971 at 4:00 P.M. Case scheduled for trial on April 19, 1971 at 10:00 A.M.
1-18-71	BY JUDD, J. MEMORANDUM FILED. For reasons contained in the memorandum, the defendant will not be required to produce any more material than has already been offered to plaintiff. (See Memo)
1-18-71	Copy of memo was on this day mailed to Bureau of National Affairs; to Anthony B. Cataldo of Krisel & Beck, Esqs., for plaintiff; to Louis E. Greco, Assistant U.S. Atty., Admiralty and Shipping Sec., etc., by the secretary to JUDD, J.

DATE	FILINGS-PROCEEDINGS
1-20-71	Memorandum of Defendant filed (U.S.A.) in support of it contention, etc.
1-20-71	Plaintiff's memorandum of Law filed, etc.
1-22-71	Before Judd, J.—Case Called-Pre-trial conference held & concluded—Case adj'd to 4/19/71 For Trial.
4- 9-71	Deft's list of exhibits and witnesses filed.
4-14-71	Notice of plaintiff filed re offer of certain exhibits, etc.
4-19-71	Before JUDD, J. Case called. Marked READY and PASSED.
4-22-71	Plaintiff's Trial Memorandum filed.
4-23-71	Trial Brief of the U.S.A. filed.
9-24-71	Copy of letter of Clerk to JUDD, J. filed dated Sept. 22, 1971 addressed to ANTHONY B. CATALDO, ESQ., that case has been set down for trial before JUDD, J. Dec. 6, 1971 at 10:00 A.M.
12- 1-71	BEFORE JUDD, J. Case called. Trial ORDERED and BEGUN. Trial adjourned to Dec. 2, 1971 at 11:15 A.M.
12- 2-71	Before JUDD, J. Case called. TRIAL resumed. Defendant moves to dismiss the complaint. MOTION DENIED. Trial continued to Dec. 3, 1971 at 11:30 A.M.
12- 3-71	Before JUDD, J. Case called. Trial resumed at 11:30 A.M. Trial continued to Dec. 6, 1971 at 10:00 A.M.
12- 6-71	Deposition of defendant filed, (Oct. 28, 1970), etc.
12- 6-71	Deposition of Charles R. Finn, on behalf of defendant, etc. Dec. 1, 1970 at 10:30 A.M.

DATE	FILINGS-PROCEEDINGS
12- 6-71	Before JUDD, J. Case called. TRIAL RESUMED. Defendant renews motion to dismiss, etc. Motions denied, Trial continued to Dec. 7, 1971 at 10:15 A.M.
12- 7-71	Before JUDD, J. Case called. Trial resumed. Parties to submit briefs, etc., by Jan. 28, 1972 plus additional time granted as required, as to stenographic record, etc. DECISION RESERVED. TRIAL CONCLUDED. Parties to submit all exhibits marked in evidence with their final briefs.
12- 8-71	Deposition of defendant U.S.A., filed
12- 9-71	Letter of Janis G. Schulmeisters, Trial Atty., filed dated Dec. 9, 1971 addressed to Law Clerk to JUDD, J., Mr. Martin C. Washton re original minutes of plaintiff, etc.
12- 9-71	Deposition of pltff on 12-30-70 filed.
12-15-71	Copy of letter of Gilbert E. Fleischer, Atty., in Charge Admiralty & Shipping Section, filed dated Dec. 13, 1971 addressed to Messrs. Krisel and Beck, etc.
12-15-71	Minutes of the stenographer filed (Dec. 1, 1971)
12-15-71	Minutes of the stenographer filed (Dec. 2, 1971)
12-15-71	Minutes of the stenographer filed (Dec. 3, 1971)
12-15-71	Minutes of the stenographer filed (Dec. 6, 1971)
12-15-71	Minutes of the stenographer filed (Dec. 7, 1971)
1-27-72	PLAINTIFF'S MEMORANDUM FILED.
2- 4-72	PLAINTIFF'S MEMORANDUM FILED.
2-17-72	REPLY BRIEF FILED.
4-20-72	BY JUDD, J. MEMORANDUM and ORDER filed. A hearing to fix damages will be held on June 19, 1972 unless the parties reach agreement on the dollar amount before that time. This memorandum

DATE	FILINGS-PROCEEDINGS
	is intended to include the court's findings pursuant to F.R. Civ. P. 52(a). ORDERED that plaintiff is entitled to recover from the defendant half its damages as hereafter agreed or determined. (See Memo., and Order) Copy mailed to attys. KRISEL & BECK; to LOUIS E. GRECO, Assistant U.S. Atty., Admiralty and Shipping Section, etc.; to Janis G. Schulmeisters; to Bureau of National Affairs, by the secretary to JUDD, J.
6-12-72	Before JUDD, J. Case called. Conference held and concluded. Case adjourned to June 19, 1972 at 10:00 A.M. for trial.
6-19-72	Before JUDD, J. Case called and adjourned WITHOUT DATE for trial and for hearing on damages.
6-21-72	GOVERNMENT'S MEMORANDUM filed in opposition, etc.
6-28-72	Memorandum of Conference filed, etc.
6-28-72	LIST OF EXHIBITS filed.
7-20-72	Before JUDD, J. Case called. Attorneys for both sides present. Trial ordered and begun. Trial continued to July 21, 1972 at 2:00 P.M.
7-21-72	Before JUDD, J. Case called. Trial resumed. Trial concluded. Post-Trial papers by Aug. 15, 1972.
8-15-72	Plaintiff's MEMORANDUM filed.
9- 1-72	Government's memorandum in opposition to Pltff's claim for damages, FILED.
9- 8-72	Affidavit of RALPH LOKEN, Vice President, etc. filed.
2- 7-73	BY JUDD, J. DECISION and ORDER filed. ORDERED that plaintiff have judgment against the U.S. in the sum of $54,270.83, but without interest prior to judgment, and that the Clerk enter judgment accordingly. (See Decision, etc.)

DATE	FILINGS-PROCEEDINGS
2- 7-73	Copy of Decision, etc., was on this day sent to Bureau of National Affairs; to Gilbert S. Fleischer, Atty., in Charge, Admiralty, etc., to Krisel & Beck, Esqs., Att: Anthony B. Cataldo, Esq., by the secretary to JUDD, J.
2-13-73	Judgment of Clerk dtd 2-13-73 in favor of pltff and against deft in the sum of $54,270.83 filed. (P/C mailed to attys).
4- 6-73	NOTICE OF APPEAL FILED (U.S.A.)
4- 6-73	Copy of Notice of appeal was on this day mailed to Clerk, U.S.C.A.
4- 6-73	Copy of Notice of Appeal was on this day mailed to Krisel, Beck & Halberg, Esqs., 12 John St., N.Y., etc.
4- 6-73	Copy of Notice of Appeal was on this day mailed to Anthony B. Cataldo, Esq., 111 Bway., N.Y., N.Y. 10006
4- 6-73	Instructions on preparation of record on appeal were on this day handed to a representative of defendant herein.
4-12-73	NOTICE OF CROSS-APPEAL FILED (Reliable Transfer Co., Inc.)
4-12-73	Copy of Notice of Cross-Appeal was on this day mailed to U.S. Atty., Gilbert S. Fleischer, Atty., in Charge etc., 26 Federal Plaza Suite 4048, N.Y., N.Y. 10007
4-12-73	BY JUDD, J. STIPULATION and ORDER filed re transcript, etc., and extending time of U.S.A., etc., from April 16, 1973 to May 7, 1973.
4-19-73	MEMORANDUM of U.S.A. filed in opposition to the taxation of costs in favor of plaintiff, etc.

DATE	FILINGS-PROCEEDINGS
5- 7-73	BY JUDD, J. Order filed extending the time of the U.S.A. etc., to comply with Rules 10 and 11 of the F.R. of Appellate procedure from May 7, 1973 to July 5, 1973, etc. (P/C mailed to attys.)
8-13-73	Affidavit of Janis G. Schulmeisters so ordered by C of A extending time to docket record on appeal filed.
8-13-73	Record on appeal certified and handed to Janis G. Schulmeisters for delivery to the Court of Appeals.

COMPLAINT OF RELIABLE TRANSFER CO., INC.

[Caption Omitted]

Plaintiff, complaining of the defendant, by Krisel & Beck, its attorneys, respectfully shows unto this Court and alleges as follows:

FIRST: This is a case of admiralty and maritime jurisdiction and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Rules of Federal Civil Procedure.

SECOND: Plaintiff is a New York corporation, having a principal office and place of business at Staten Island, County of Richmond, State of New York, conducting the business of transporting petroleum products, and at all pertinent times, it was the owner and manager and operator of a self-propelled oil tanker, *Mary A. Whalen*, which was at all said time and times staunch, strong, well equipped and properly manned and in every respect seaworthy, and plaintiff was, also, the bailee of a cargo of 76,795 gallons of No. 6 oil and of a cargo of 149,931 gallons of No. 4 fuel oil laden on board the *Mary A. Whalen*.

THIRD: The defendant, United States of America, is a sovereign and has consented to be sued in admiralty and maritime matters in accordance with Title 46 U.S.C.A. Section 741 et seq.; or if it be determined that the admiralty jurisdiction does not extend over the matters of this suit, then said defendant has consented to be sued pursuant to the Federal Tort Claims Act, 28 U.S.C.A. 1346(b), 2671 et seq.

FOURTH: That the rock jetty or breakwater at the extreme southern e[illegible] of Rockaway Point, on the western end of the Rockaway peninsula, in the Borough of Queens, City of New York, is and has at all times hereinafter mentioned been under the lawful jurisdiction of the United States, and at the end of said rock jetty, a permanent navigational light was constructed as required by law, as an aid to navigation of vessels proceeding in

the waters adjacent thereto and that the United States Coast Guard, an agency of the United States was invested by Chapter 5 of Title 14, U.S.C.A., with the functions and powers of maintaining, keeping and attending to all aids to navigation such as the light at Rockaway Point in order to aid the navigation of vessels in the waters near and adjacent thereto.

FIFTH: That said breakwater at Rockaway Point extends out to sea for a considerable distance, encroaching upon the navigable waters at the confluence of the Atlantic Ocean, the Lower New York Bay, Rockaway Inlet and Jamaica Bay.

SIXTH: That said light at Rockaway Point is required at all times to be lit exhibiting, a flashing red light and such light with such distinguishing features is customarily accepted and relied upon by navigators moving in and out of the Rockaway Inlet and East Rockaway Inlet and past the breakwater itself, as an aid to enable them to fix their position with relation to their proper and safe navigation in and out of said inlets or past Rockaway Point.

SEVENTH: That on or about the 23rd day of December, 1968, at about 1920 hours, the tanker, *Mary A. Whalen*, with a load of No. 6 oil intended for the *S.S. Ksyra* and a load of No. 4 fuel oil on board her intended for Oilport Terminals, Inc. in Island Park, New York, departed from Constable Hook to proceed first to Island Park and there to discharge her cargo of No. 4 fuel oil. She proceeded down the bay, through the Narrows and through Coney Island channel intending to pass south of the Rockaway Point light, keeping it clear to port after which her course could then be set for the entrance to the East Rockaway inlet. While at water level darkness prevailed, nevertheless, visibility of lighted objects at a distance was good. The *Mary A. Whalen* was proceeding at about 10 knots through the water, the tide was flooding, reducing the speed of the *Mary A. Whalen* over the ground to about 8 knots; the wind was off the aft port quarter of the *Whalen*, when she was approaching to

turn to port off Rockaway Point. While thus proceeding and when the *Mary A. Whalen* was northwest of the F.L.R. No. "2" buoy at the entrance of the lower bay, the *Mary A. Whalen's* master suddenly and simultaneously observed that the *Whalen* was close in to the westerly shore of the breakwater and that the usual flashing red light at the end of the breakwater was dead. The master of the *Mary A. Whalen* immediately put his engines full astern but the *Whalen*, nevertheless, fetched up on the beach on the westerly side of the breakwater. Unable to free herself with her own power, the captain of the *Whalen* called the Coast Guard for assistance. For three days after that the *Whalen* remained hard aground despite various efforts at freeing her from her strand. On the 26th day of December, 1968 after having discharged her cargo of oil to the barge *Oswego*, the *Whalen* was pulled free of her strand at about 15.35 hours of said 26th day of December, 1968. That as a result of the said stranding, the *Mary A. Whalen* sustained serious injury to her hull, engines and appurtenances and she was compelled to be taken to Bushey's Dry Dock to effectuate repairs, and her cargo was suffered to sustain serious loss and damage.

EIGHTH: The aforesaid stranding of the *Mary A. Whalen* and the loss or damage to her hull, engines, appurtenances and to the cargo aforesaid were not caused or contributed to by any fault or negligence on the part of those in charge of the *Mary A. Whalen*, but were caused wholly by and were due solely to the fault and negligence on the part of the defendant and those in charge of the light beacon under the jurisdiction of the defendant's Coast Guard at the end of the Rockaway Point breakwater, in the following particulars, among others, which will be brought out upon the trial.

1. In knowingly and carelessly failing to keep the light of the beacon flashing in the manner required by the Statute and Regulations.

2. In permitting said beacon to go out, depriving navigators of the aid to their navigation that was to be given by such light.

3. In failing to keep a substitute light for the darkened beacon at the end of Rockaway Point, suitable to act as an aid to navigation as required by the Statutes and Regulations.

4. In that the light beacon at the Rockaway Point breakwater was not in charge of competent personnel.

5. That the persons in charge of the light beacon at the Rockaway Point breakwater were careless, negligent and inattentive to their duties.

6. In allowing the breakwater at Rockaway Point to remain dark through the night.

7. In failing to keep the beacon under close observation, in view of its past history of light failures.

8. In failing to notify and warn navigators of the fact that the light at Rockaway Point was out.

NINTH: By reason of the premises and as a result of the stranding aforesaid, plaintiff has sustained heavy damage, consisting of the cost of salvaging the *Mary A. Whalen* and her cargo, the cost of repairs, the loss of use of the vessel, rehauling and reshipping the cargo, general average expenses and other general expenses necessarily expended or incurred in connection with said stranding and as bailee of said cargo of oil, plaintiff suffered loss or damage to a large quantity thereof, all of which, as nearly as can be estimated at present, will amount to about One Hundred Ten Thousand ($110,000.00) Dollars, no part of which sum has been paid although duly demanded.

TENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, plaintiff prays:

(a) That a summons be issued to the defendant in person to appear and answer the complaint or be required to suffer a default;

(b) That plaintiff have judgment against the defendant for the sum of $110,000.00, with interest from December 23, 1968, and the costs and disbursements of this action; and

(c) That plaintiff have such other and further relief as may be just and proper in the premises.

KRISEL & BECK
Attorneys for Plaintiff
Office and P.O. Address
12 John Street
New York, N.Y. 10038
Tel. No. 964-2651

by MAURICE A. KRISEL
a member of the firm

ANSWER OF UNITED STATES OF AMERICA

[Caption Omitted]

Defendant, United States of America, for its answer to the complaint, shows upon information and belief:

1. Admits each and every allegation contained in Paragraph First.

2. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Second, and specifically denies that the oil tanker *Mary A. Whalen* at material times was staunch, strong, properly equipped and manned and seaworthy.

3. Denies each and every allegation contained in Paragraph Third, except that it admits that the United States of America has consented to be sued under the terms and conditions of the Public Vessel's Act, 46 U.S.C. Secs. 781-790, which incorporates by reference the Suits in Admiralty Act, 46 U.S.C. Secs. 741-752.

4. Denies each and every allegation contained in Paragraph Fourth, except that it admits that at the southerly end of the rock jetty at Rockaway Point, on the western end of the Rockaway Peninsula, in the Borough of Queens, City of New York, a navigational light was maintained as an aid to navigation by the United States Coast Guard, an agency of the United States, pursuant to authority vested in it by Chapter 5 of Title 14, U.S.C.A.

5. Denies each and every allegation contained in Paragraph Fifth, except that it admits that the breakwater at Rockaway Point extends out to sea.

6. Denies each and every allegation contained in Paragraph Sixth.

7. Denies each and every allegation contained in Paragraph Seventh.

8. Denies each and every allegation contained in Paragraph Eighth.

9. Denies each and every allegation contained in Paragraph Ninth, except that it admits demand and non-payment.

10. Denies each and every allegation contained in Paragraph Tenth, except that it admits the admiralty

and maritime jurisdiction of the United States and of this Honorable Court.

AS AND FOR A FIRST, SEPARATE AND COMPLETE, DEFENSE DEFENDANT, UPON INFORMATION AND BELIEF, ALLEGES:

11. If plaintiff suffered any damages as alleged in the complaint, which is denied, they were solely caused or contributed to by the negligence of the master, officers and crew members of the oil tanker *Mary A. Whalen* and/or the negligence of those for whom plaintiff is responsible.

AS AND FOR A SECOND, SEPARATE AND COMPLETE, DEFENSE DEFENDANT, UPON INFORMATION AND BELIEF, ALLEGES:

12. If plaintiff suffered any damage as alleged in the complaint, which is denied, they were solely caused by or contributed to by the negligence of third parties for whom defendant, United States of America, is not responsible.

WHEREFORE, defendant demands judgment dismissing the complaint with costs and disbursements and for such other and further relief as to the Court may seem just and proper.

EDWARD R. NEAHER
United States Attorney

LOUIS E. GRECO
Attorney in Charge
Admiralty & Shipping Section
U. S. Department of Justice
26 Federal Plaza, Suite 4048
New York, N. Y. 10007
Attorneys for Defendant

By: JANIS G. SCHULMEISTERS

SUPREME COURT OF THE UNITED STATES

No. 74-363

UNITED STATES, PETITIONER

v.

RELIABLE TRANSFER CO., INC.

ORDER ALLOWING CERTIORARI—Filed November 18, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 568443 69

Supreme Court, U. S.
OCT 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

74—363.

UNITED STATES OF AMERICA,
Petitioner,

v.

RELIABLE TRANSFER CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

COPAL MINTZ,
MAURICE A. KRISEL,
Counsel for Respondent.

KRISEL, BECK & HALBERG,
Attorneys for Respondent,
55 Liberty Street,
New York, N. Y. 10005
212 964-2151.

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IN THE

Supreme Court of the United States

October Term, 1974.

UNITED STATES OF AMERICA,

Petitioner,

against

RELIABLE TRANSFER Co., Inc.,

Respondent.

BRIEF IN BEHALF OF RESPONDENT.

In behalf of the Reliable Transfer Co., Inc., the following is respectfully submitted in response to the Solicitor General's petition.

Question Presented.

The petition herein seeks an abrogation of the admiralty rule of equal division of damages. For the reasons set forth below, Respondent does not believe that this case presents an appropriate factual situation for a reconsideration of that rule.

(1). Contrary to the Petitioner's view, *the facts* in this case *are in dispute.* While the evidence is not in dispute, very much disputed are the conclusions which the courts below drew from the undisputed evidence (i) that respondent was causatively co-negligent with the Coast Guard and (ii) that respondent's negligence was three times that of the Coast Guard.

We argued in the court below, and *reiterate* here, that on the basis of the evidence as summarized by the trial court, the sole maritime responsibility for the grounding of the vessel was the Coast Guard's statutory tort of failing—in this instance, egregiously—to maintain in operating order a crucially important breakwater light. Support for that conclusion is offered *infra*.

Therefore, we respectfully suggest that the most likely fate of a review of the case, if the Petition were granted, would be a repetition of *United Oil Co. v. San Jacinto*, 409 U. S. 140 (1972). That, of course, would be highly gratifying to respondent.

(2). Even if it fairly may be concluded that there was some causative contributory negligence in the navigation of respondent's vessel, we urge that the contributory effect thereof, if any, was minimal—and even if more than minimal, the proportionate fault at the very worst, was the converse of that attributed by the judgment—we say: certainly no more than 25% may be charged to the navigation of the vessel and not less than 75% to the Coast Guard.

(3). Before going into the evidence in support of the foregoing, it seems to us fair to say that the Petition's argument against the equal division rule proceeds on the erroneous assumption that the rule is predicated upon an "unjust and arbitrary" attribution of equal degrees of fault, regardless of fact. That, we submit, is not the basis of the rule. Rather, with its "major-minor" corollary (*The City of New York*, 147 U. S. 72 [1893], cited by Petitioner on p. 6), the rationale of the rule, we suggest is that where two (or more) parties have been causatively at fault, the *relative degree* of a party's fault *is irrelevant* where the accident would not have occurred in the absence of such fault (cf. *Cooper Stevedoring Co. v. Kopke*, 40 L. Ed. 20, 694, 700, May 28, 1974).

In those circumstances, the accident logically is equally attributable to both (or all) parties regardless of their respective degrees of fault—the more or less (whether 25% or less or 50% or more) in such cases is devoid of realistic consequence since without such fault (whatever its relative degree) the accident would not have occurred. Where the causation thus is joint, of what consequence are the exact proportions? Each party can truthfully say to the other: "If it were not for your negligence, the accident would not have occurred." That being the fact, is it not just and equitable that the consequent loss be borne equally regardless of the degrees of respective fault?

Doubtless, it was such analysis and appraisal that resulted, at common law, in the rule that in such circumstances neither could recover from the other and both (or all) were fully responsible to third parties injured by them. Admiralty, however—probably with more perception—conceived that in such circumstances justice required that, rather than denial of recovery to the mutual tort-feasor, it would be more equitable to hold each party equally responsible to the other (*The Max Morris*, 137 U. S. 1, 8-9, 1890, and cases cited therein) and, as at common law, both (or all) be held fully responsible to third parties. Both rules excluded the notion that greater equity would be achieved between mutual tort-feasors by pro-rating the damages on the basis of respective degrees of fault where (whatever the degree) there would have been no accident without it.

Moreover, such apportionment of causative fault on a percentage basis assumes a non-existent mathematical capability—a capability which the trial judge in this case acknowledged he did not possess when he said (20)*: "Al-

*Numerals in parentheses, except where otherwise indicated, refer to pages of the Government's Petition and its appendages.

location of proportionate fault is not capable of mathematical certainty, but the court's judgment is • • •."

Realistically, can a judge responsibly say 25% rather than 20% or 15% or rather than 30% or 35%? And should a trial court's percentage guess be protected, by the "unless clearly erroneous" rule, against second guessing on the same evidence by a reviewing court.

(4). Nor without weight is the fact that in the 64 years since the promulgation of the "International Convention for the Unification of Certain Rules to Govern the Liability of Vessels When Collisions Occur Between Them," Congress has failed to ratify that convention (Petition, p. 7 footnote). Article 4 of that convention provides for liability "in proportion to the degree of the faults respectively committed" *except*, it is worthy of note, *where "it is not possible to establish the degree of the respective faults," in which cases "the liability shall be apportioned equally* (*id.*; emphasis added).

(5). Here, the trial court found (12):

> "If the *breakwater light had been flashing, he [the captain of respondent's vessel] would doubtless have been able to change his course in time to avoid stranding.*" (Emphasis added.)

The Court of Appeals agreed (10):

> "The court found, *as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel.*" (Emphasis added.)

The trial court recognized also that in respect to aids to navigation established by the Coast Guard, "14 U. S. C.

§2, requires that they be maintained in proper order and position" (20).

Since but for the Coast Guard's failure to perform its statutory duty the vessel would not have been stranded, there comes into play the rule that such breach of a statutory duty casts upon the breaching party the burden to show "beyond a reasonable doubt" that its fault was not the exclusive cause of the accident (*The Pennsylvania*, 86 U. S. [19 Wall.] 125, 22 L. E. 148 [1874]; *Merritt, Chapman & Scott Corp., v. Cornell Steamship Co.*, 265 F. 2d 537, 539, 2d Cir., 1959). Directly the converse is the finding that but for the Coast Guard's neglect of its duty, the accident would not have occurred.

The Evidence.

(As set forth by the Trial Court.)

(1). At the outset of his memorandum and order (12-24), District Judge Judd of the United States District Court for the Eastern District of New York summarized the case as follows (12):

> "This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding."

(2). The facts regarding the non-functioning of the light on the night of December 23, 1968, when the stranding took place, are set forth by the Judge as follows (17):

> "The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.
>
> "After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours • • •."

in contrast to the two hour mandate. On the night of December 23, obviously, many multiples of two hours had gone by since the light had gone out on the twenty-second.

"• • • On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly" (18).

"The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation. This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours" (18; emphasis added).

"A night-time verification of the success of the repairs was essential after routine efforts had proven futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd • • •." (18-19).

> "When lit, that breakwater light was usually visible for about 4 miles" (14).

(3). On the night of the accident, December 23, 1968: "The wind • • • was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity" (13). At the vessel's entry into the inlet, the "tide was at flood • • •, waves were 8 to 10 feet high" (14).

The mishap is set forth by the trial judge as follows (15): "While navigating through the inlet, when the captain of the vessel saw "a barge ahead off the port side," he "continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he observed the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge." In the course of such maneuvering "he saw a dark shadow ahead and asked the deckhand to shine the search light on it; it proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He [thereupon] turned to the left because there were rocks to the right, and the vessel landed broadside in the sand."

The Trial Judge found the captain at fault because, upon realizing that he could not pass the tug and tow that were ahead, he made a radical change of course without making sure of his position by using the "chart, searchlight, radio-telephone, and radar" with which the vessel was equipped (19-20). That assumes that in the exigencies of the emergency with which the captain was confronted—including a "gale blowing at 45 knots" and

"8 to 10 foot seas" (19) —he had the time and opportunity to utilize the enumerated facilities, when, in fact, he was bent on avoiding colliding into the tug or tow.

But for the non-functioning of the breakwater light, the captain would have known his position.

That, because of the absence of the light, the captain "miscalculated [his] exact location," in the words of somewhat analogous *Casement v. Brown,* 148 U. S. 615, 625 (1893),* "does not subject [him] to the condemnation of negligence." That is "placing too severe a condemnation on the conduct" of a captain in order to relieve, in this case, the Coast Guard "from liability for the results of their • • • certainly undoubted • • • negligence" (at p. 626).

In *Indian Towing Co. v. United States,* 350 U. S. 61 (1955), this Court said (at p. 69):

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

(5). As already noted, Judge Judd found and the Court of Appeals agreed: "If the breakwater light had

*The cause there was a submerged pier.

been flashing, [the captain] would doubtless have been able to change course in time to avoid stranding" (12).

Such being the case, it seems startling that the Judge came to the conclusion not only that the captain was at fault but that his "fault was more egregious than the fault of the Coast Guard" (19).

On the basis of the findings quoted at pages , *supra,* the adjective "egregious," applies to the negligence of the Coast Guard and not to the conduct of the captain in the emergency created by the absence of light on the breakwater in the midst of 1. an embarrassing tug and tow, 2. winds of gale force and 3. heavy water.

October 25, 1974.

Respectfully submitted,

COPAL MINTZ,
MAURICE A. KRISEL,
Counsel for Respondent.

Supreme Court, U. S.
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No. 74-363

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

RELIABLE TRANSFER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

CARLA A. HILLS,
Assistant Attorney General,

JOHN P. RUPP,
Assistant to the Solicitor General,

WILLIAM KANTER,
RICHARD A. OLDERMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A) is reported at 497 F. 2d 1036. The memorandum and order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1974 (Pet. App. C). On August 13,

1974, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Marshall to and including October 1, 1974. The petition for a writ of certiorari was filed on September 30, 1974, and was granted on November 18, 1974 (A. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admiralty rule currently applied in collision cases of dividing damages equally where both parties are found to have been at fault should be replaced by a rule dividing damages in proportion to fault.[1]

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[1] In its brief in opposition to certiorari, respondent sought to raise an additional issue of a factual nature concerning the negligence of its vessel, the *Mary A. Whalen* (Br. in Op., p. 2). The Government's position below with regard to the issue of the parties' relative fault was that the fact that the Rockaway Point breakwater light was inoperative was not a causative factor in the *Mary A. Whalen's* running aground since the evidence at trial showed that the captain and crew of the vessel had actual knowledge of the light's condition some thirty minutes before the accident (Pet. App. B, p. 14). The Government does not have the duty affirmatively to guide the mariner, but only the duty not to mislead him through engendering reliance on an extinguished aid. *Indian Towing Co.* v. *United States*, 350 U.S. 61. Thus, the actual knowledge of the defective aid on the part of the captain and crew of the vessel negates any reliance on the aid and supports the conclusion of the lower court as to fault on the part of the *Mary A. Whalen.*

It is clear, however, that no issue concerning the parties' relative fault is properly before the Court. While the Government does not accede to the lower courts' conclusion on the issue of liability, the Government chose not to petition on this

STATEMENT

The *Mary A. Whalen*, owned by respondent Reliable Transfer Co., left Constable Hook, New Jersey, in gale winds and heavy seas on the evening of December 23, 1968, bound for Island Park, New York. Her planned passage led across New York Harbor and the Lower Bay to Coney Island Channel; southerly from Coney Island Channel through Rockaway Inlet; and east from Rockaway Inlet over open seas to East Rockaway Inlet and journey's end at Island Park (Pet. App. B, pp. 12-13).

The Rockaway Inlet is only 400 yards wide and lies between a breakwater to the east and the shore to the west. The breakwater is marked at its southern terminus by the Rockaway Point breakwater light, which is maintained by the Coast Guard and on most occasions is visible for four miles. On the night of the *Mary A. Whalen's* ill-fated journey, this light was out. Approximately thirty minutes before the vessel's grounding, the captain and one of the two crew members saw that the breakwater light was not operating. The captain pointed out the con-

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basis and respondent, having chosen not to file a cross petition for certiorari, may not now challenge the lower courts' findings with respect to its negligence. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191. The findings in this case concerning relative fault were concurred in by both lower courts. In those circumstances, review in this Court is foreclosed by respondent's inability to make "a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde, Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

dition of the light to the other crew member at that time (*id.* at p. 14).

The tide was at flood and the waves, convulsed by gale winds, were eight to ten feet high when the captain of the *Mary A. Whalen*, while negotiating the Rockaway Inlet, negligently maneuvered to pass a fast-moving barge ahead of his vessel. Failing to overtake the barge, the captain made a U-turn without proper precaution, passed behind the barge and set off on an easterly course. A minute thereafter an object came into view before his craft. This proved to be the Rockaway Point light structure on the breakwater. Swerving to avoid the rocks, the captain ran the *Mary A. Whalen* aground (*ibid.*).

Respondent filed suit against the United States in the district court pursuant to the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. 1346, *et seq.*, seeking to recover for damages sustained by the *Mary A. Whalen* by reason of the grounding (A. 8). The district court found that the grounding was caused 25 percent by the Coast Guard's failure to maintain the breakwater light and 75 percent by the captain's negligence in failing to check his position before setting his vessel on a new course in a channel he knew to be dangerous (Pet. App. B, p. 20). On the issue of comparative fault, the court found in part that

> [t]he fault of the vessel was more egregious than the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow

> space between bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. * * *
>
> Equipped with look-out, chart, searchlight, radio-telephone, and radar, he made use of nothing except his own guesswork judgment. * * * The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. [*Id.* at p. 19.]

The court held, however, that the admiralty rule of divided damages dictated that each party bear one-half of the losses, noting that "[w]hile division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent" (*id.* at p. 22).

The court of appeals affirmed the factual findings of the district court, noting that "[t]he vessel's claim that it was not at fault borders on the frivolous * * *" (Pet. App. A, p. 10). On the issue of the proper division of damages, the court of appeals stated that while it "recognize[d] the force of the argument that in this type of case division of damages in proportion to the degree of fault may be more equitable," it felt compelled "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress" (*id.* at p. 11).

SUMMARY OF ARGUMENT

This case presents in clear and uncomplicated form the important question of whether the American admiralty rule of equally-divided damages should be

overruled. In general, the rule provides that in collision cases involving mutual fault the damages must be divided evenly without regard to the parties' respective degrees of fault. The historic antecedents of the rule may be traced to the ancient laws of France and England, although the conditions which originally justified the rule have long since disappeared. Consequently, the rule has now been abrogated in every major maritime nation—with the exception of the United States. The continued vitality of the rule in this country has been almost universally criticized, by doctrinal writers, major admiralty courts and by most of those directly affected by application of the rule.

This Court granted certiorari in *Union Oil Co. of California* v. *The San Jacinto*, 409 U.S. 140, principally to reconsider the appropriateness of the rule but failed to reach the issue when a finding was made absolving one of the vessels from fault. The present case squarely presents the issue for resolution.

ARGUMENT

THE RULE OF DIVIDED DAMAGES HAS OUTLIVED ITS USEFULNESS AND SHOULD BE REPLACED BY THE MORE EQUITABLE PROPORTIONAL FAULT RULE

A. The Historic Antecedents of the Divided Damages Rule No Longer Justify the Rule's Application in the United States

The divided damages rule had its genesis at a time when the law had not yet developed the practice of founding liability upon negligence.[2] The earliest known codification of the rule is in Article XIV of the Laws of Oleron, which were first published in the thirteenth century and are generally considered to be the most direct precursors of English admiralty law.[3] Article XIV of the Laws of Oleron provided that in cases of collision involving a ship at anchor and one under way, the resulting damages were to be shared equally between the two ships—provided that the captain and crew of the ship under way swore upon their oaths that the collision had occurred accidentally.[4] Apart from being inapplicable to cases of purposeful collision, therefore, the rule had nothing whatever to do with fault. Instead, the rule was intended to operate solely as a risk-sharing device.[5]

While the relevant historical evidence is sparse, it is generally thought that the Laws of Oleron were applied from the thirteenth through the sixteenth centuries in the local maritime courts which sat in the seaport towns of England.[6] For much of this

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[2] The notion of tying civil liability to negligence was unknown in the medieval common law. 8 Holdsworth, *A History of English Law* 266-269 (1931).

[3] Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304, 306 n. 16 (1957).

[4] An English translation of the Laws of Oleron may be found in 30 Fed. Cas. 1171-1187.

[5] Staring, *supra*, 45 Calif. L. Rev. at 306.

[6] The Roll De Superioritate Maris et Jure Admiralitatis Angliae of 12 Edw. 3 (1338) refers to "La Ley Oleyroun" as the law of the English Admiralty. Marsden, *Collisions at*

time they were no doubt equal to the maritime problems which arose.[7] They made no provision for collisions involving more than one moving ship, however, and as seaborne commerce expanded the rules necessarily required augmentation.

In both England and France the divided damages rule was extended during the seventeenth century to cover maritime collision cases characterized as involving either "inevitable accident," where neither vessel was to blame, or "inscrutable fault," where blame could not be determined. It was also applied, particularly during the first half of the century, to cases in which the collision had been caused by the "sole fault" of one of the ships. Application of the rule during the seventeenth century was hardly consistent, however, in large part because of the contemporaneous development of negligence concepts in the law generally and the difficulty of harmonizing the divided damages rule—and especially its application to "sole fault" situations—with these nascent concepts. Thus, as the seventeenth century drew to a close and the eighteenth century began, the original

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Sea 152 (10th ed. 1953). The Laws of Oleron were cited as authority by the parties in *Pilk* v. *Venere*, 23 Edw. II (1350), a case removed to the Chancery from the Bristol Tolsey Court. Selden Society, *Select Cases Concerning the Law Merchant A.D. 1239-1633*, Vol. 46, xcv-xcvi (1930).

[7] One of these problems was the apparently widespread practice engaged in by the owners of old and worthless vessels of anchoring those vessels in the path of on-coming ships, with the intention of collecting full damages. Cleirac reported that the divided damages rule was first applied to deter this practice. Cleirac, *Us et Coustumes de la Mer* 66 (Bourdeaux, 1661).

rationale of the divided damages rule was undergoing substantial erosion. Because of this, it has been suggested that the rule "barely survived to pass into modern jurisprudence * * *."[8]

During the first half of the eighteenth century the appropriateness of basing liability upon negligence, when that could be determined, had become sufficiently accepted that damages were seldom divided in collision cases whenever one of the vessels was found to have been in "sole fault." The rather consistent practice, in England at least, was instead to restrict application of the rule to three categories of cases: (1) those found to have been an "inevitable accident," (2) those involving "inscrutable fault," and (3) those involving "mutual fault." For reasons which are not clear, the records of the English admiralty courts do not contain any cases decided during the period from 1746 to 1789 in which a division of damages was ordered—although the reports reveal that the practice during the last two decades of the eighteenth century was generally consistent with the practice which had prevailed during the first half of the century.[9]

By the end of the eighteenth century, the necessity of establishing negligence as a trigger for liability

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[8] Staring, *supra*, 45 Calif. L. Rev. at 308. The history of the rule of divided damages in the decisions of the English admiralty courts is superbly set forth by Marsden in his *Collisions at Sea*, *supra*, at 138-149, as well as in his introduction to Volumes 6 and 11 of the Selden Society's *Select Pleas in the Court of Admiralty* (1894).

[9] Staring, *supra*, 45 Calif. L. Rev. at 309.

had become firmly imbedded in English jurisprudence.[10] As noted above, the patent inconsistency of negligence doctrine with application of the divided damages rule to collisions attributable solely to the fault of one of the vessels was perceived early in the eighteenth century. At the same time, the introduction of negligence into admiralty law also ran counter to admiralty's practice of ordering a division of damages in "inevitable accident" situations. By the end of the eighteenth century, the latter problem in particular had made a further reexamination of the divided damages rule almost inevitable.

When that reexamination came, in *The Woodrop-Sims*, 2 Dods. 83, 165 Eng. Rep. 1422, it swept beyond the reach of the divided damages rule in English admiralty law not only collisions aptly characterized as "inevitable accidents" but also those in which the locus of the fault could not be determined (so-called "inscrutable fault" cases). In *The Woodrop-Sims*, decided in 1815, Lord Stowell (then Sir William Scott)—in dicta which has since become famous—divided maritime collisions into four categories: (1) collisions solely the fault of the plaintiff's vessel, (2) collisions solely the fault of the defendant's vessel, (3) collisions attributable to the fault of both, and (4) collisions attributable to the fault of neither. According to Lord Stowell, an equal division of damages was appropriately ordered only in cases in which both vessels were at fault. 2 Dods. at 85, 165 Eng. Rep. at 1423.

[10] 8 Holdsworth, *History of English Law* 453-459 (1931).

This dictum became the law of England nine years later. In *Hay* v. *LeNeve*, 2 Shaw Sc. Ap. Cas. 395, a mutual fault collision case, the House of Lords reversed a Scottish court which had apportioned damages according to fault and, primarily on the basis of *The Woodrop-Sims*, ordered that the damages be divided equally. The rule of divided damages was followed in England in cases of mutual fault, although not without substantial criticism,[11] until the proportional fault rule of the Brussels Collision Liability Convention was adopted in 1911.[12]

Since American courts were generally quite familiar with the development of English jurisprudence, the divided damages rule was probably applied in America at the close of the eighteenth century and the beginning of the nineteenth in much the same form as it was being applied in England. The first reported American case containing a statement of the rule was not decided, however, until 1836. In *Ralston* v. *The State Rights*, 20 Fed. Cas. 201, the court stated that damages were generally equally divided in America in cases of mutual fault. But the court did not apply the rule to the case before it because it found that the negligence of only one of the vessels had

[11] Lord Denman, for example, characterized the divided damages rule as "arbitrary" and "not as dictated by natural justice" in *De Vaux* v. *Salvador*, 4 Ad. & El. 420, 431-432. See also, *The Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795, 799, 819, where both Lord Selborne and Lord Blackburn criticised the rule.

[12] 1 & 2 Geo. 5, c. 57 (1911). See discussion, *infra*, at pp. 26-31, 32-33.

caused the collision for which damages were being sought. *Id.* at p. 208. In *Strout* v. *Foster*, 1 How. 89, 92, the Supreme Court cited with apparent approbation the divided damages rule as stated by Lord Stowell in *The Woodrop-Sims*, *supra*, but again refused to apply it because the case before it was one of sole fault.

In 1854 this Court was finally presented with a mutual fault case and the issue of the liability rule appropriately applied to such cases. In *The Schooner Catharine* v. *Dickinson*, 17 How. 170, 177, the Court stated that "[t]he rule that prevails in the district and circuit courts, we understand, has been to divide the loss. * * * This also seems to be the well-settled rule in the English admiralty." The Court then held, without any extended analysis of the rule's implications or of possible alternatives, that

> [u]nder the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation. [*Ibid.*]

Since 1854 the divided damages rule has often been invoked by this Court to govern mutual fault collision cases,[13] as well as cases such as the present in which a vessel has gone aground.[14] While the

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[13] *E.g.*, *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597; *The Eugene F. Moran*, 212 U.S. 466; *The North Star*, 106 U.S. 17.

[14] *E.g.*, *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341.

Court's opinion in *The Schooner Catharine* does not provide much insight into the rationale for the rule's application to cases of mutual fault, subsequent cases make it clear that the Court's decision rested upon two distinct bases. In *The Max Morris*, 137 U.S. 1, for example, this Court plainly stated that the rule was founded "upon the difficulty of determining, in [mutual fault collision] cases, the degree of negligence in the one and the other." *Id.* at p. 12. In the same case, the Court noted with approval the improvement worked by application of the rule upon the common law principle barring recovery to one contributorily negligent, thus suggesting that the characterization of the divided damages rule in *The Schooner Catharine* as "most just and equitable" reflected dissatisfaction with the common law contributory negligence bar. Accord *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 111.

As should be clear from this brief sketch of the history of the divided damages rule, much of the rule's vitality over time can be explained simply in terms of the rule being better, more equitable than readily perceived alternatives. When originally applied, the rule represented an obvious step forward for a system of jurisprudence in which the idea of tying liability to negligence was unknown. The ultimate acceptance of negligence, however, deprived the divided damages rule for a time of coherent and demonstrable rationale. That rationale was provided, and the continued vitality of the rule ensured, by at least two factors: first, judicial disaffection with

contributory negligence and, second, the experience of courts with the rule had shown that it was easy to apply.

But these factors hardly justify the continued application of the divided damages rule in the United States. While the common law doctrine of contributory negligence worked injustice by placing the entire burden upon one of the parties at fault, the equal division rule is not much better; for it often inflicts upon an individual more harm than he deserves.[15] Similarly, while requiring trial courts to assess blame and to apportion liability accordingly may have involved at one time too ambitious an undertaking, the experience gained by courts in this country during the last fifty years in applying proportional fault rules has made that clearly not the case today.[16]

B. The Divided Damages Rule Is Inequitable in Those Cases in Which Fault Is Not Equally Divided

While the divided damages rule was adopted by this Court in order to effect a more equitable distribution of the losses among wrongdoing ships than permitted by the common law, which forbade recovery to the contributorily negligent, it at best brought into the law a roughhewn form of justice. For almost fifty years following the rule's adoption by this Court in The *Schooner Catharine* v. *Dickinson*, *supra*, the rule was applied in the United States by

[15] See discussion, *infra*, at pp. 14-17.

[16] See discussion, *infra*, at pp. 34-36.

simply adding the total damages sustained and then dividing that sum equally between the parties—without any regard whatever to the parties' relative fault.[17] The harshness of the rule in cases of widely disparate fault was eased somewhat by this Court's creation of the "major-minor fault" exception,[18] but even in its present form the rule metes out inequitable results in the vast majority of cases to which it is applied and seems woefully out of place in any modern system of admiralty law.

The rule's capacity for producing harsh results is perhaps most vividly illustrated in those cases in which one of the vessels involved was in violation of a statutory rule of navigation at the time of the collision. This Court has held that in those circumstances the vessel guilty of the statutory violation must prove "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" a contributing

[17] The manner in which damages normally are computed and divided in maritime collision cases covered by the divided damages rule was spelled out in 1873 in *The Sapphire*, 18 Wall. 51, 56, as follows:

> It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. But this rule is applicable only where it appears that both vessels have been injured. If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault.

[18] See discussion, *infra*, at pp. 23-25.

cause. *The Pennsylvania*, 19 Wall. 125, 136. Since the so-called "Pennsylvania rule" was adopted by this Court, a few cases have been reported in which courts have decided that the statutory violation "could not" have contributed to the collision.[19] In most cases, however, the rule has been literally applied and fault has been found.[20] The consequent division of damages in such circumstances has often produced results which are impossible to justify on any rational basis, particularly where one of the vessels has been grossly negligent and has suffered all of the damage while the statutory violation commited by the other vessel has been almost or purely technical.[21]

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[19] *Compania de Maderas, Etc.* v. *The Queenston Heights*, 220 F.2d 120 (C.A. 5); *Seaboard Tug & Barge, Inc.* v. *Rederi A/B Disa*, 213 F.2d 772 (C.A. 1); *The William J. Riddle*, 102 F. Supp. 884 (S.D. N.Y.), affirmed *per curiam*, 200 F.2d 608 (C.A. 2).

[20] *In The New York Marine No. 10*, 109 F.2d 564, 566 (C.A. 2), for example, the court—applying the "Pennsylvania rule"—held that

> [t]he charterer is therefore * * * liable in full if it is held that the absence of a second deckhand was a cause of the accident. Since the absence has been found, and the lack is admitted to be a statutory fault (see 46 USCA §§ 222, 362 and 405) it is presumed that the fault is a contributory cause, and the petitioner must bear the burden that it was not * * * [citing *The Pennsylvania* and other cases]. This burden it has not met, for it is impossible to say that the other deckhand might not have been on duty instead of Costello on the morning of the collision, had there been two deckhands on board.

See also cases cited in Griffin, *The American Law of Collisions* § 202 (1949).

[21] For a partial listing of the numerous federal and state statutes governing navigation, see Jackson, *The Archaic*

The inequity of applying the divided damages rule in cases such as the present should also be obvious. The district court found that 75 percent of the cause of the *Mary A. Whalen's* grounding was attributable to the negligence of the vessel's own captain and crew and that only 25 percent could be attributed to the inoperative condition of the Rockaway Point breakwater light (Pet. App. B, p. 20). This finding was specifically endorsed by the court of appeals (Pet. App. A, p. 10). All of the damage caused by the grounding, moreover, was sustained by the vessel. Yet, under the divided damages rule the Coast Guard is liable for 50 percent of those damages.

C. The Inequity of the Divided Damages Rule Has Been Almost Universally Recognized by Courts and Commentators

The procedures followed in maritime collision cases operate in such a way that much of the inequity of the divided damages rule is insulated from public

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Rule of Dividing Damages in Marine Collisions, 19 Ala. L. Rev. 263, 271-272 (1967). Jackson concludes his discussion of the "Pennsylvania rule" with the following statement:

> Confronted with an ever-growing assortment of statutes, regulations and local ordinances, it is not surprising for a reasonably taut ship to find that she has been condemned by the Pennsylvania rule, even though her navigation may have fully satisfied the test of reasonable prudence. [*Id.* at p. 272.]

scrutiny—including from the bench and bar. Those cases that proceed to trial normally terminate with an interlocutory decree resolving the issue of the parties' respective fault but leaving the amount and division of damages to private agreement or to a special master. In the event one or more of the parties takes an appeal, the predicate is almost always the interlocutory decree, which is appealed under 28 U.S.C. 1292. Since the decree itself as well as the record on appeal are usually devoid of any evidence from which the appellate court could determine the amount and direction of the monetary payment passing between the parties because of the divided damages rule, the pressure from lower courts for abrogation of the rule has been less than should otherwise have been expected.[22]

Despite this relative lack of awareness of the results of applying the rule, in terms of dollars and cents, the lower federal courts have not suffered the rule silently. When confronted with the comparatively rare cases challenging the rule's application, the courts have repeatedly criticized the rule as "unjust and arbitrary,"[23] "illogical,"[24] and "un-

[22] The procedures employed in the trial of maritime collision cases are discussed in Jackson, *The Archaic Rule of Dividing Damages in Marine Collisions*, 19 Ala. L. Rev. 263, 265-266 (1967).

[23] *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F.2d 485, 488 (C.A. 3).

[24] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 317, 321 (C.A. 2).

fair."[25] "An equal division in this case would be plainly unjust," wrote Learned Hand, dissenting in *National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (C.A. 2): "they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving of the ancient

[25] *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F.2d 618, 620 (C.A. 2).

Other decisions critical of the rule include: *Mystic S.S. Corp.* v. *M/S Antonio Ferraz*, 498 F.2d 538, 539 n. 1 (C.A. 2) "The obvious inequities of the 'procrustean' divided-damages rule have been subjected to abundant criticism * * *."); *Petition of Oskar Tiedemann and Co.*, 289 F.2d 237, 241-242 (C.A. 3) ("It seems too bad that the Elna should be tarred with the same stick as the Mission in this case. If we had a rule which divided responsibility in proportion to the negligence of the parties, as is the case in many other countries, we could make an equitable adjustment. But our American rule of even division of the damages makes for some hard cases and this is one."); *In re Adams' Petition*, 237 F.2d 884, 887 (C.A. 2) ("We have frequently called attention to the inherent injustice of this rule.") (*per curiam*); *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (C.A. 2) ("[W]e have no power to divest ourselves of this vestigial relic; we can only go so far as to close our eyes to doubtful delinquencies."); *Luckenbach S.S. Co.* v. *United States*, 157 F.2d 250, 252 (C.A. 2) ("This is a case where the Continental rule of comparative negligence would produce a more just result."); *The City of Chattanooga*, 79 F.2d 23, 24 (C.A. 2) ("It is indeed unfortunate that the faults cannot be apportioned, for that of the libelant's steamer * * * was so gross that upon any just allocation she ought to bear substantially all the loss.") (*per curiam*); *St. Louis-San Francisco Ry. Co.* v. *Motor Vessel D. Mark*, 243 F. Supp. 689, 693 (S.D. Ala.) ("The Court would prefer to apply the comparative negligence doctrine in this case * * *.").

rule which has been abrogated by nearly all civilized nations." [26]

Although most lower courts have felt constrained to follow the divided damages rule, a few have chosen to apportion damages more equitably. The first step in this direction was taken by the Third Circuit Court of Appeals in *The Margaret*, 30 F. 2d 923. In that case, the court initially ordered a 75 percent/25 percent apportionment but retreated to an equal division on rehearing, feeling itself bound by the divided damages rule. In *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, the Second Circuit affirmed without comment the district court's 60 percent/40 percent apportionment of damages.

As recently as 1962, one district court engaged in what could only be characterized as intellectual gymnastics in an effort to avoid the inequity of the divided damages rule. In *N. M. Patterson & Sons, Ltd.* v. *City of Chicago*, 209 F. Supp. 576, 588 (N.D. Ill), the district court, presented with a case involving unequal fault, concluded:

> Thus it is seen that the general interpretation of the Supreme Court cases discussed above has resulted in holdings which, despite grave misgivings, have applied equal division to every type of collision case. As noted by the opinions supporting these holdings, the normal product of applying equal division to cases of unequal fault has been manifest injustice. Certainly, our Supreme Court in first applying the principle never intended to cause such harsh results in the future.

[26] Certiorari denied *sub nom. Burns Steamship Co.* v. *National Bulk Carriers, Inc.*, 340 U.S. 865.

The district court therefore ordered the damages apportioned according to fault.[27]

The lower federal courts have also indicated their displeasure with the principle of divided damages by using the proportional fault rule whenever such a course has appeared to be justified by the international character of the case. For example, *The Mandu*, 114 F. 2d 361 (C.A. 2), certiorari denied *sub nom. Great American Insurance Co.* v. *Companhio de Navegacao Lloyd Brasileiro*, 311 U.S. 715, involved a collision in Brazilian waters between two steamships, one German and the other Brazilian. Although the district court divided the damages equally, the Second Circuit reversed, holding that the Brazilian proportional fault rule should apply. *Partenreederei Wallschiff* v. *The Pioneer*, 164 F. Supp. 421 (E.D. Mich.), involved a collision on the Canadian side of the St. Clair River between a German

[27] The court of appeals reversed because it found that the accident had been solely the fault of one of the parties. The court noted, however, that had the accident been caused by the parties' mutual fault, the district court would have been obligated to divide the damage equally. 324 F.2d 254 (C.A. 7).

Other reported cases in which courts have apportioned damages in maritime collision cases in proportion to fault include *The No. 6-H*, 108 Fed. 429 (E.D. N.Y.); *The Mary Ida*, 20 Fed. 741 (S.D. Ala.). See also *McKeel* v. *Schroeder*, 215 F. Supp. 756 (N.D. Calif.); *Tracy Towing Line* v. *City of New Jersey*, 105 F. Supp. 910 (D. N.J.).

motorship and an American steamer. The district court, finding that 95 percent of the fault was attributable to the German motorship, remarked that it was "grateful for the circumstances that this collision happened in Canadian waters," thus enabling the court to invoke the Canadian proportional fault rule. *Id.* at p. 430. The Sixth Circuit affirmed without comment. 287 F. 2d 886. In *Labrador Steamship Co.* v. *M/V EGLE*, 1971 A.M.C. 2344 (N.D. Ohio), a case arising out of a collision in the Canadian waters of the St. Lawrence Seaway, the district court applied Canadian law and allocated damages 95 percent/5 percent, remarking that the "harsh provisions" of American law "would compel an even division of the total damages between the parties, although * * * the plaintiff's damages are more than three times as great as the cross-plaintiffs." *Id.* at p. 2349.

Leading commentators on the law of admiralty have not treated the divided damages rule any more kindly than have the lower federal courts. Gilmore and Black state in their treatise, *The Law of Admiralty* (1957 ed.), for example, that "[i]t is exceedingly hard to see why the rule of divided damages should be thought more likely to 'induce care' than any other rule that penalized negligence." *Id.* at p. 438. They then postulate the case in which one vessel, sustaining most or all of the damage, has been grossly negligent while the other vessel has been in technical but plain fault. The outcome of such a case under the divided damages rule would generally in-

volve a substantial payment by the less negligent vessel to the grossly negligent. According to Gilmore and Black,

> [t]his result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence; actually, in the case supposed, many people might think justice better served by letting all parties walk out of court empty-handed, as the contributory negligence rule would do. [*Id.* at p. 439.] [28]

This Court has implicitly recognized the inequity of the divided damages rule by excluding from cases of mutual fault subject to the rule those in which the fault of one vessel has been "major" and the fault of the other "minor." The first complete statement of this exception appeared in *The City of New York*, 147 U.S. 72, in which the Court stated:

> Where fault on the part of one vessel is * * * of itself, sufficient to account for the disaster * * * any reasonable doubt with regard to the propriety of the conduct of such other vessel

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[28] Other academic criticism includes: Donovan, *Mutual Fault-Half Damage Rule—A Critical Analysis*, 41 Ins. Coun. J. 395 (1974); Allbritton, *Division of Damages in Admiralty —A Rising Tide of Confusion*, 2 Journal of Maritime Law and Commerce 322 (1971); Jackson, *The Archaic Rule of Dividing Damages in Maritime Collisions*, 19 Ala. L. Rev. 263 (1967); Staring, *supra*, 45 Calif. L. Rev. at 304; Mole & Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333 (1932); and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Corn. L. Q. 531 (1928).

> should be resolved in [the other vessel's] favor. [*Id.* at p. 85.] [29]

In practice, however, the "major-minor fault" exception has proven to be vague and unreliable and itself subjects vessels to liability in excess of their fault. In the words of Learned Hand, it is "in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." *National Bulk Carriers*, 183 F. 2d 405, 410. "[O]ne of the merits of * * * permitting damages to be divided on other than an equal basis," Judge Friendly has commented, "is that it avoids the vagaries of the 'major-minor fault rule.'" *Lady Nelson, Ltd.* v. *Creole Petroleum Corp.*, 286 F. 2d 684, 688 (C.A. 2). Judge Maris, in *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F. 2d 485, 488 (C.A. 3), complained:

> Where * * * the fault of one vessel is palpably major and that of the other extremely minor the obvious injustice of the application of the rule of equal division of damages has led the courts to avoid it by glozing and ignoring the minor fault and imposing sole responsibility upon the vessel gravely at fault, as was done in some of the cases upon which the appellant here relies. But to ameliorate the unjust effect of one arbitrary rule by applying another which is equally arbitrary seems hardly the way to promote justice and reach an equitable result. How much better it would be to apply, in cases where it was feasible to do so, a rule of comparative fault analogous to that now applied in the admiralty in cases of personal injuries.[30]

[29] For other formulations of the test for determining "major" and "minor" fault, see *The Victory & The Plymothian*, 168 U.S. 410, 423; *The Oregon*, 158 U.S. 186, 204.

D. The United States Today Stands Alone Among the Leading Maritime Nations in Retaining the Divided Damages Rule

Perhaps the most telling criticism of the divided damages rule is the fact that the United States is today the only major seafaring nation in which damages in mutual fault collision cases are not awarded in proportion to fault.

The isolated maintenance of the divided damages rule by this country has continuing adverse consequences, which exist quite apart from the inequities occasioned in particular cases. These include an unfortunate and unnecessary amount of confusion and unpredictability in maritime commerce and the encouragement of international forum shopping. Gilmore and Black provide the following example. Ships A and B collide, Ship A suffering damages of $100,000 and Ship B suffering damages of $50,000. Ship A is 80 percent at fault. The divided damages rule would require a United States court to add the dam-

[30] See also Staring, *supra*, 45 Calif. L. Rev. at 341 n. 242 ("The courts have so much travail in attempting to determine what is sufficiently minor or major and are so often reversed on this point that it is surprising that proportional damages has not made more headway."); Gilmore and Black, *The Law of Admiralty* 403 (1957 ed.) ("The major-minor fault 'rule' is vague and unreliable * * *.").

ages suffered by the two vessels and to divide them equally, requiring Ship B to pay $25,000 to Ship A. In contrast, a court applying the proportional fault rule would require that a $20,000 payment be made by Ship A to Ship B. The difference of $45,000 makes international forum shopping worthwhile. If the disparity of the potential recovery under the two rules is large enough, moreover, the owners of the vessels often will initiate and attempt to maintain litigation independently of one another, thereby posing difficult problems of comity. Gilmore and Black, *supra*, at 439. See *Petition of Bloomfield S.S. Co.*, 422 F. 2d 728 (C.A. 2); *Isbrandtsen Co.* v. *Lloyd Brasiliero Patrimonio Nacional*, 85 F. Supp. 740 (E.D. N.Y.).[31]

With the exception of the United States, all major maritime nations—including Great Britain, from whom we obtained the divided damages rule, and our neighbors Canada and Mexico—have ratified or adhere to the Brussels Collision Liability Convention of 1910 which provides, in paragraph 1 of Article 4, for the apportionment of damages according to the "degree" of fault in all cases in which it is possible

[31] For a further discussion of these problems, see Sundstrom, *Foreign Ships and Foreign Waters Acta Institutae Upsaliensis Iurisprudentiae Comparativae* 89-125 (Uppsala, 1971); Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions To Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 Yale L. J. 878, 879-893 (1955); and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Corn. L. Q. 531 (1938).

to do so.[32] The United States was a signatory to the original draft of the Convention, and it was transmitted to the Senate for ratification in April, 1937.[33] After hearings, the Convention was favorably reported out of the foreign relations subcommittee to which it had been assigned. It was then sent to the full Foreign Relations Committee with a letter from Secretary of State Hull strongly endorsing the convention on behalf of the Departments of State and

[32] Article 4, paragraph 1, provides:

> If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it apears that the faults are equal, the liability shall be apportioned equally. 6 Knauth's *Benedict on Admiralty* 39 (7th ed. 1969).

The countries which have ratified or adhere to the Brussels Convention include Argentina, Australia, Austria, Belgium, Brazil, Canada, Danzig, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Mexico, Newfoundland, New Zealand, Netherlands, Nicaragua, Norway, Poland, Portugal, Romania, U.S.S.R., Sweden, Switzerland, Turkey, Uruguay, and Yugoslavia. Knauth, *supra*, at 38-39.

[33] The 27 year delay in submitting the Convention to the Senate for its advice and consent was due to several factors, among them opposition from the cargo underwriters, the outbreak of World War I and the decision of President Hoover to hold submission of the Convention in abeyance until other similar conventions, then under consideration, were also ready to be submitted to the Senate. See Hearings before Senate Subcommittee on Foreign Relations on Rules to Govern the Liability of Vessels When Collisions Occur Between Them, 75th Cong., 3d Sess. 76-77.

Commerce and the Maritime Commission.[34] The coming of World War II stayed Congress' hand, however; and in April, 1947, President Truman withdrew the Convention as well as 18 other unratified treaties from the Senate's calendar.[35]

The Senate hearings reveal that adoption of the Convention was vigorously opposed by representatives of American cargo interests and by the Marine Law Association.[36] Their criticism, however, was directed principally at Article Four, paragraph two, which eliminated the joint and several liability of vessels for cargo damage.[37] Cargo interests contended that such a fundamental charge in their right to recovery should be effected, if at all, by regular legislative processes and not by treaty ratification. Concern was also expressed over Article Six, which eliminated legal presumptions of fault with respect to liability for

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[34] The letter is printed in 1939 A.M.C. 1068.

[35] 16 Department of State Bulletin 726 (1947).

[36] For a detailed discussion of the opposition of cargo interests to the Convention, see Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention To Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 Yale L. J. 878 (1955).

[37] Article Four, paragraph two, provides:

> The damages caused either to vessels or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties. [Knauth, *supra*, at 39.]

collision. Little objection to the proportional fault rule itself was voiced.[38]

In 1961 the Maritime Law Association reversed the position which it had adhered to for fifty years and endorsed the basic principles of the Collision Convention, recommending congressional adoption.[39] The following year, the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce held hearings on S. 2314, domestic legislation designed to implement the Collision Convention.[40] The American Bar Association, which in 1929 opposed congressional ratification of the Convention, reversed its position and strongly urged passage of the new bill, noting that "[t]he rest of the world has long recognized that liability should be proportionate to fault * * *."[41] Similar statements of support of the legislation came from the Maritime Law Association, the American Merchant Marine Institute, and trade associations serving American vessels involved in domestic and foreign trade, as well as from the

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[38] Two opponents of the Convention predicted that the proportional fault rule would be difficult to administer. Hearings, *supra*, at 182, 204.

[39] Maritime Law Association of the United States, Document No. 450 (October 23, 1961).

[40] Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on S. 2313 To Unify Apportionment of Liability in Cases of Collision Between Vessels, and Related Casualties, and S. 2314 To Limit the Liability of Shipowners, and for Other Purposes, 87th Cong., 2d Sess.

[41] *Id.* at p. 27.

Maritime Administration, and the Departments of State, Commerce and the Treasury. Although some criticism of the bill was voiced, it was directed at provisions other than the proportionate fault rule, which was uniformly endorsed. The legislation was reported out of committee favorably, but the Eighty-Seventh Congress adjourned in 1962 without taking further action.[42]

The failure of Congress in the years following completion of the Brussels Convention to consider the proportional fault rule, for which there is almost unanimous support, independently of other provisions of the Convention, to which there is substantial opposition, only confirms the appropriateness of this Court's adoption of the rule. The initial and continued application of the divided damages rule in this country is wholly a function of decisions of this Court; abrogation of the rule would simply be in recognition of the fact that its continued application is anomalous and inequitable and that, since Congress has been unable to act on this matter, the responsibility for the rule has remained with this Court. Finally, it should be noted that adoption of the proportional fault rule by this Court would not prejudice

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[42] Similar legislation was introduced in 1963. Hearings were again held, but the Eighty-Eighth Congress adjourned without acting. See Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on S. 555 A Bill to Unify Apportionment of Liability in Cases of Collision Between Vessels, and in Other Maritime Casualties, and S. 556 A Bill to Limit the Liability of Shipowners, and for Other Purposes, 88th Cong., 1st Sess.

future consideration by Congress of other provisions of the Brussels Convention and their eventual approval or disapproval.

E. There Are No Impediments To Adoption of the Proportional Fault Rule by This Court

Adoption of the proportional fault rule by this Court to cover mutual fault collision cases in which the parties' respective degrees of fault can be determined would not create any inconsistencies or anomalies in the law generally, or defeat the intent of other related rules in American admiralty law. Neither would application of the proportional fault rule to cases such as the present upset settled expectations, encourage litigation or create confusion. It would, on the other hand, bring this important aspect of American admiralty law into line with the rules prevailing elsewhere in the world. The experience of other countries with the proportional fault rule has demonstrated beyond dispute that the rule can be feasibly and equitably administered. This Court has traditionally entertained a broad discretion in admiralty to fashion rules which fairly balance competing interests. This discretion should be exercised in the present case.

1. *Adoption of the Proportional Fault Rule Would Not Create Disharmonies with Other Areas of Law*

Gilmore and Black conclude their discussion of the divided damages rule with the statement that "[t]he abrogation of the rule would not, it seems,

produce any disharmony with other branches of the maritime law, general or statutory." Gilmore and Black, *supra*, at 442.

As noted above, Congress' failure to ratify the Brussels Convention has been due in large part to opposition to the Convention by cargo interests. But this opposition has not been directed at the proportional fault rule, and it is not believed that cargo interests would oppose adoption of the rule by this Court to cover cases such as the present. Under American law, cargo presently has the right to full recovery for damages sustained in maritime collisions if two or more vessels are involved and the non-carrying vessel is found to have been at fault, even if that fault has been minor when compared to the fault of the carrying vessel.[43] This principle was established by this Court in *The Alabama and The Game-cock*, 92 U.S. 695, which held specifically that the immunity from liability for damage to cargo enjoyed by carrying vessels under the Harter Act, 46 U.S.C. 190, *et seq.*, and the Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.*, did not extend to non-carrying

[43] Although this formulation assumes a maritime collision involving two vessels, a carrying vessel and a non-carrying vessel, it is well settled that the same principle applies to cases such as the present. Had the stranding of the *Mary A. Whalen* resulted in damage to its cargo, the Government could have been held fully liable for such damages even though the fault of the Coast Guard was found to have been only a relatively minor contributing factor in the collision. *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341, 345; *Russell, Poling & Co.* v. *United States*, 140 F. Supp. 890, 893.

vessels whose negligence contributed to the collision in which cargo was damaged.

It has been clear since this Court's decision in *The Chattahoochee*, 173 U.S. 540, however, that the statutory immunity of carrying vessels from liability to cargo does not override generally-accepted contribution principles. Under the rule announced in *The Chattahoochee*, cargo may recover its full damages in mutual fault collision cases from the non-carrying vessel. But the non-carrying vessel may in turn require a contribution of one-half of that amount from the carrying vessel. Carrying vessels have not been permitted to escape such liability by writing indemnification clauses into bills of lading. *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236.

Adoption by this Court of the proportional fault rule to govern cases such as the present would not affect cargo's right to recover in any of the circumstances described above. Under the proportional fault rule, cargo would still be permitted to recover in full from the non-carrying vessel in mutual fault collision cases—or from the Government in cases such as the present. The only impact of the rule would occur in those cases in which the non-carrying vessel or party seeks contribution from the carrying vessel. In that event, the carrying vessel would be required to contribute to the non-carrying vessel or party in proportion to its own fault.

Adoption by this Court of the proportional fault rule would also not affect the rule of *The Pennsyl-*

vania, supra, which provides that any vessel in violation of a statutory rule of navigation at the time of the collision is presumed to have been guilty of negligence and to have contributed to the accident. This presumption would continue to operate under a proportional fault scheme, unless expressly overruled by this Court. Indeed, to the extent that the vessel guilty of the statutory violation was unable to establish that that violation could not have contributed to the collision the vessel would be liable for its proportional share of any consequent damages.

Finally, it could be argued with some persuasiveness that adoption of a proportional fault rule would make unnecessary the "major-minor fault" exception to liability created by this Court in *The City of New York, supra*. We submit, however, that the possibility of discarding that exception must be counted as one of the important advantages of the proportional fault rule. As noted earlier, the "major-minor fault" exception has proven difficult, if not impossible, to apply in any rational manner and itself subjects vessels to liability in excess of their fault.

2. *The Proportional Fault Rule Can Be Feasibly and Equitably Administered*

Gilmore and Black have stated that the only objection to adoption by this Court of the proportional fault rule with *any* plausibility is the difficulty in collision cases of assigning relative degrees of fault. Gilmore and Black, *supra*, at 440. They quickly discount this objection, however, noting that

> [t]he answer is, of course, that judges would simply approximate, as best they could, as is done every day in other cases in matters of amounts of damages, degree of disability, etc. An attempt at a division on the basis of degree of fault would at least not be foredoomed to go badly wrong in a large number of cases, as is the present rule. [*Ibid.*]

It is important to emphasize in this regard that the Government seeks abrogation of the divided damages rule, and application of the proportional fault rule, only in those cases found to involve disparate degrees of fault. The divided damages rule would continue to be applied in those cases in which fault could not be apportioned between the parties on any rational basis. It is also significant that the countries which have adopted the proportional fault rule have not reported any difficulties in applying it. See Mole & Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333, 348 (1932); *In re Adams' Petition*, 125 F. Supp. 110, 114, (S.D.N.Y.), affirmed, 237 F. 2d 884 (C.A. 2).

Further, it should be noted that this Court has already rejected the application of the divided damages rule in admiralty personal injury cases in favor of proportional fault. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406. Indeed, proportional fault rules have come to occupy so much of tort law, and American judges have become so used to applying them, that an objection to the rule at the present time on grounds of administrative feasibility would be almost frivolous. See, *e.g.*, Merchant Marine ("Jones") Act, 46 U.S.C.

688; Death on the High Seas Act, 46 U.S.C. 766; Federal Employers Liability Act, 45 U.S.C. 53; and Prosser, *Law of Torts* (4th ed. 1971), at pages 435 through 438 for a listing of the many state comparative negligence laws.

We submit in addition that there is no reason to believe that settlements would be impeded and litigation increased were this Court to adopt the proportional fault rule. At best, such an argument in opposition to the proportional fault rule would be highly speculative. Under the present divided damages rule, moreover, the owner of a vessel which is not as extensively damaged in a collision as another vessel has an incentive not to settle since by postponing the day of judgment he also postpones having to pay the owner of the other vessel one-half of the total damages suffered. This incentive is even stronger in cases in which the fault of the relatively undamaged vessel is minor compared to the fault of the other vessel. In the latter class of cases, there is always the possibility of ultimate exoneration from liability under the "major-minor fault" rule. Regardless of the impact of a proportional fault rule on settlements over time, however, we submit that there is a substantial question whether the law of damages ought to be so structured that inequitable settlements, involving an equal division of damages without regard to the parties' respective degrees of fault, are encouraged.

3. *Abandonment by this Court of the Divided Damages Rule Would Be In Keeping With Its Traditional Willingness in Admiralty Cases To Break With Custom In Order To Secure a More Equal Distribution of Justice*

This Court has long affirmed that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the sound discretion of the courts. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409; *The Palmyra*, 12 Wheat. 1, 9-10; *The Marianna Flora*, 11 Wheat. 1, 24-25. A particularly instructive example of this refusal to be bound by custom where justice dictates a contrary result is presented by this Court's decision in *Moragne* v. *States Marine Lines*, 398 U.S. 375.

The petitioner in *Moragne* had brought suit in federal court seeking to recover damages for the wrongful death of her husband, a longshoreman. The suit had been dismissed by the district court, and the dismissal affirmed by the court of appeals, because of the absence of any state statutory right of action and because this Court had held in *The Harrisburg*, 119 U.S. 199, that federal maritime law does not afford a cause of action for wrongful death. In reversing dismissal of petitioner's suit, this Court first reviewed the historic antecedents of *The Harrisburg* and concluded that the holding in that case had never had much more to recommend it than "primitive English legal history." 398 U.S. at 379. On the other hand, the Court noted that the policies favoring the existence of such a cause of action were substantial and that it was "of major significance" that since

The Harrisburg was decided the rule against recovery for wrongful death had been abandoned in most areas of the world—including in England. The Court then stated that the crucial threshold question was whether any act of Congress had given an "affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* at p. 393. Since the Court concluded that no act of Congress could be so construed it overruled *The Harrisburg* and in effect created for the first time in federal maritime law a remedy for wrongful death. In explaining its decision, the Court stated in part that

> [w]e do not regard the rule of *The Harrisburg* as a closely arguable proposition—it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and * * * has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today. [*Id.* at 404-405; footnote omitted.]

In a similar fashion, the Court should discard the outmoded and inequitable rule of divided damages in collision cases and replace it with a rule awarding damages in proportion to fault.

CONCLUSION

It is therefore respectfully submitted that the judgment below should be reversed.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

JOHN P. RUPP,
Assistant to the Solicitor General.

WILLIAM KANTER,
RICHARD A. OLDERMAN,
Attorneys.

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COPAL MINTZ

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No. 74—363

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OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Petitioner,

v.

RELIABLE TRANSFER CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

COPAL MINTZ
HERBERT B. HALBERG
Counsel for Respondent

KRISEL, BECH & HALBERG
Attorneys for Respondents
55 Liberty Street
New York, N. Y. 10005
(212) 964-2151

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RESPONDENT'S BRIEF

Questions Presented

In respondent's view, the questions presented herein are:

1. Do the circumstances of this case require, or render appropriate, reconsideration of the Admiralty Rule of equal division of damages?

2. If so, should the Rule be altered by this Court?

Respondent urges that no is the proper answer to each of those questions.

Contrary to petitioner's contention, respondent believes that above question 1 is properly before this Court. This is discussed at pages 10-14 *infra*.

The Case

(i). Petitioner's statement of the case overlooks critical findings of the trial court which were affirmed by the Court of Appeals.

It was *on those findings* that respondent predicated its cross-appeal to the Court of Appeals and argued—and on the Government's application for certiorari *reiterated in this Court*—that the trial court erred, as a matter of law, in *concluding* (from those findings) that the Coast Guard was chargeable with only 25% of the damage and the vessel with 75%.

We argued that on the basis of the evidence, as summarized by the trial court, the sole maritime responsibility for the grounding of the vessel was the Coast Guard's statutory tort of failing—in this instance, egregiously—to maintain in operating order a crucially important breakwater light.

We argued further that even if it fairly could be concluded that there was some causative contributory negligence in the navigation of *respondent's* vessel, the contributory effect thereof, if any, was minimal and most certainly not more than 25%, the converse of the holding of the courts below.

(ii). At the outset of his memorandum and order (12-24)[1], District Judge Judd of the United States District Court for the Eastern District of New York summarizes the case as follows (12):

> "This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was

[1] Numerals in parentheses, when not otherwise indicated, refer to pages of the Government's Petition for Certiorari and its annexes.

> not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. *If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding.*" (Emphasis added.)

The Court of Appeals agreed (10):

> "The court found, *as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel.*" (Emphasis added.)

(iii). The facts regarding the non-functioning of the light on the night of December 23, 1968, when the stranding took place, are set forth by the Judge as follows (17):

> "The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.
>
> "After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours . . ."

in contrast to the two hour mandate.

On the night of December 23, obviously, many multiples of two hours had gone by since the light had gone out on the twenty-second.

The trial judge continued:

> ". . . On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly" (18).

. . . . . .

"The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation. This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours" (18; emphasis added).

"A night-time verification of the success of the repairs was essential after routine efforts had proven futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd • • •." (18-19).

When lit, that "breakwater light was usually visible for about 4 miles" (14).

(iv). On the night of the accident, December 23, 1968: "The wind • • • was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity" (13). At the vessel's entry into the inlet, the "tide was at flood • • •, waves were 8 to 10 feet high" (14).

(v). The mishap is described by the trial judge as follows (15):

> [While navigating through the inlet, when the captain of the vessel saw] "a barge ahead off the port side" . . . [he] "continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he obsedved the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge."

In the course of such maneuvering, the captain, the trial judge said (15):

> "saw a dark shadow ahead and asked the deckhand to shine the searchlight on it. The shadow proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He turned to the left because there were rocks to the right, and the vessel landed broadside in the sand."

When the Captain made the U-turn he believed that he was south of the breakwater (16). Had that been the fact, he would not have stranded; so the Court found (id.). But actually the vessel was too far north for the turn to be made (16-17). "In other words, [the Captain] did not know where he was when he made the fateful turn" (17).

(vi). In those circumstances, the trial judge concluded —improvidently, we submit—that the captain was at fault because, upon realizing that he could not pass the tug and tow that were ahead, he made a radical change of course without making sure of his position by using the "chart, searchlight, radio-telephone, and radar" with which the vessel was equipped (19-20).

That assumes that the captain should have suspected that he was not where he believed he was—when he had no reason to believe other than that he was heading for the open sea.

The criticism assumes also that in the exigencies of the emergency with which the captain was confronted—including "gale blowing at 45 knots" and "eight to ten foot seas" (19)—he had the time and opportunity to utilize the enumerated facilities.

The criticism assumes further that had the captain engaged in all that investigation, he would have avoided stranding the vessel as well as colliding into the tug or tow.

The criticism ignores the finding that "if the breakwater light had been operating, the captain would not have

stranded the vessel'' (10, affirming the trial judge's holding at 12).

Summary of Respondent's Argument

1. On the facts as set forth by the trial judge (quoted above) and affirmed by the Court of Appeals, the correct conclusion is that the accident is attributable *solely* to the Coast Guard's violation of its statutory duty and egregious negligence. Hence, as in *Union Oil Co.* v. *The San Jacinto,* 409 U.S. 140 (1972), the "continued vitality of the [equal division] rule in this country'' is not a necessary issue in this case.

2. If the Court reaches consideration of the rule, it should reaffirm it—or refuse to abrogate it—because:

(a) The rule, with its "major-minor'' corollary, is logical, sound, just, equitable and practical—in any event, far more so that a rule that "liability . . . shall be in proportion to the degree of the faults respectively committed''.

(b) The existing rule is so integrally embedded in federal admiralty law that Congress is the only appropriate body to determine whether it should be superseded.

I

The quoted findings inexorably lead to the conclusion that the vessel's captain is not chargeable with negligence to any degree.

(i). Directly applicable is this Court's holding in *Casement* v. *Brown,* 148 U.S. 615 (1893). There the defendant had failed to replace a buoy over a submerged pier which was under construction. The defendant urged that collision with the pier was chargeable exclusively to the pilots because, *inter alia,* they were familiar with the area, knew

that construction was in progress, knew the location of the piers, the extent to which work had progressed and that there were partially submerged piers, saw such and yet did not stop or send anyone forward to make inquiries. This Court held at pages 625-6:

> ". . . the fact that, in this case, [the pilots] miscalculated the exact location of the submerged pier does not subject them to the condemnation of negligence."
>
> • • •
>
> ". . . *it would be placing too severe a condemnation on the conduct of the pilots in charge of the boats, to say that their error of judgment, their dependence on the appearance of the stream, and their reliance upon the duty of the defendants to place suitable buoys or other warnings, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence.*" (emphasis added)

(ii). Also applicable is the rule that where there is a violation of a statutory rule which is intended to prevent collisions and the like,

> "it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the [violator] of showing not merely that [its fault] might not have been one of the causes, or that it probably was not, but that it could not have been one. Such a rule is necessary to enforce obedience to the mandate of the statute''.
>
> *The Pennsylvania,* 19 Wall. 125, 136 (1873).

When the violator fails to meet that burden of proof and the

> "fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with

regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of of the conduct of such other vessel should be resolved in its favor."

The City of New York, 147 U.S. 72, 85 (1892).

The foregoing fully applies to the Coast Guard's failure to keep its breakwater light burning.

Thus, the Court of Appeals, in *Merritt, Chapman & Scott Corp.* v. *Cornell Steamship Co.,* 265 F 2d 537 (2d Cir., 1959), in discussing the failure of a vessel to set sufficient lights in violation of 33 U.S.C. 180, stated at page 539:

> ". . . but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of *The Pennsylvania,* 19 Wall 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a 'statutory rule intended to prevent collisions . . . the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but, that it could not have been' . . . It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6,000 feet the 'Lion' would nevertheless have failed to act in season, especially when it needed so little added to time to clear the 'ice-breaker'."

(iii). The trial judge's criticism of the captain relates to his execution of the "turning maneuver *necessitated* by the presence of a tug and tow" (12; emphasis added). The maneuver, including the final turn, was perfectly correct—a "normal course" (15)—if the vessel were where the captain believed it to be, with "open sea ahead" (12). In fact, he had not gone as far north as he thought; he was in the immediate vicinity of the inoperative breakwater light

(19). "If the breakwater light had been flashing [the captain], would doubtless have been able to change his course in time to avoid stranding" (12; also 10). It is obvious, too, that had the light been burning, the captain would have known where he was or he would not have been where he was.

Despite that, the trial judge criticized the captain because he did not "turn on the radar . . . did not use his search light . . . did not take a fix on the Rockaway Point Inlet light . . . left his chart in the drawer (15-16). It is not clear whether the criticism is that the captain should have done all that before he had changed his course to avoid the tug and tow (16, 19) or only before making the final turn (15, 19).

Whichever it be, the criticism assumes that the captain should have known or suspected that he was close to the breakwater and had not, as he thought, passed it and was entering the "open sea ahead". There would have been no such mistake and (as both the trial judge and the Court of Appeals found) no accident, had the breakwater light been flashing.

Was the mistake, in those circumstances, both blameworthy and proximate to the stranding, although there would have been neither mistake nor stranding had the light been functioning?

Moreover, with a "gale blowing at 45 knots" and "with eight to ten foot seas" (19) and a tug and tow in his path, how should the captain have piloted the vessel while he engaged in the investigation suggested by the court? Should he have stopped the engines or reversed them or continued on his course? What would have been the result of any of those operations?

The answer to all those questions is that the Coast Guard's proximate violation of its statutory duty eliminates those inquiries.

II

The incorrectness of the conclusion (from the affirmed findings of fact) that petitioner's negligence was 25% is properly before this Court.

(i). Customarily, this Court does not make determinations of law which are not necessary to the proper disposition of a case. That rule is particularly appropriate where, as in this case, the Court is requested to overrule a principle which has been uniformly applied by the federal courts since the founding of the Republic.

Therefore, as recently as 1972, in *Union Oil Company* v. *San Jacinto,* 409 U.S. 140, where, as here, certiorari was granted to review the equal division rule, this Court subsequently abstained from ruling on the point when, upon a full consideration of the record, it came to the conclusion that only one of the parties had been at fault.

(ii). Overlooking that pertinent precedent, petitioner (in a footnote at pp. 2-3 of its brief)—citing *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 191 (1937)—argues that "no issue concerning the parties' relative fault is properly before the Court," because, "the Government chose not to petition on this basis" and respondent did not cross-petition. In the *Morley* case, in an appeal by a defendant from a judgment against it, the Court of Appeals, although the plaintiff had not cross-appealed, remanded the case to the trial court to fashion a very different judgment for the plaintiff, both "in substance and in form . . . the facts being found anew and differently, the law declared anew and differently, and the relief remodelled and adapted to the new law and the new facts" (at page 191). Because such relief in favor of the plaintiff-appellee was not encompassed by the defendant's appeal, this Court reversed the decree of the Court of Appeals and remanded the case to that court "to pass upon the question, not yet definitively answered, whether relief in

the form of a decree" which had been prayed for, "is proper in the circumstances, and for other proceedings in accordance with this [Court's] opinion."

That holding, we submit, has no application to this case because the plaintiff in this case did cross-appeal in the Court of Appeals and sought judgment for the full amount of the damage. The certiorari which this Court has granted in this case, we believe, brings up for review the intrinsic correctness of the affirmance by the Court of Appeals, regardless of who petitioned for review—at least to the extent of determining whether the question which motivated the grant of review is necessarily presented by the case.

In that connection it is important to take into account that the plaintiff had no right of appeal to this Court. A petition for certiorari solely to review the correctness of the 25%-75% apportionment of fault—not the equal division rule—would have flaunted this Court's Rule 19. When the government petitioned solely on the ground that the equal division rule is an anachronism whose abandonment is long overdue, plaintiff responded that this case is not appropriate for the reconsideration of the rule because, as in the *Union Oil* case, *the petitioner was solely at fault,* the contrary conclusion by the courts below being contrary to their findings of fact. That issue having been thus raised with a specific reference to the *Union Oil case,* is not the question whether petitioner was solely at fault (or at fault not less than 50%) inherently a *preliminary* or threshold issue the determination of which is *prerequisite* to reconsideration in this case of the equal division rule?

In the *Union Oil* case, although certiorari was granted "principally to consider petitioner's request that [this Court] abandon the divided damage rule . . . orderly disposition of the issues presented by the petition" was held to require consideration of the issue of liability before reaching the question of damages" (at p. 141; emphasis added).

This Court concluded (at p. 146):

> "Since in our view respondents alone were at fault there is no occasion to consider how damages should be apportioned were both vessels at fault."

If in that case this Court had determined that the petitioner alone was at fault—rather than the respondent—would it have ignored that fact and determined whether the equal division rule should be abrogated?

Although not cited by petitioner, we do not overlook the holding in *Cooper Stevedoring Co., Inc.* v. *Fritz Hopske Inc.*, 417 U.S. 106 (May 1974), in footnote 4 (at p. 109), that the respondent by not having filed a petition for certiorari barred itself from urging that it was entitled to full indemnity from the petitioner rather than the half that had been awarded. There, however, as we understand the case, the respondent's position rested on a claim (which the courts below had rejected) of a breach by petitioner of a contract provision; thereby respondent sought to raise an issue *distinct from the issue* for which petitioner was granted certiorari, namely whether the admiralty equal division rule applied to liabilities created by statute. Here, however, respondent does not raise an issue extraneous to the admiralty rule which petitioner desires to be rescinded.

(iii). The government argues further that consideration of whether this is an appropriate case for the reconsideration of the equal division rule "is foreclosed" by the rule that an affirmed finding is not reviewable by this Court in the absence of "a very obvious and exceptional showing of error" (citing *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) and *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635, 1967).

Respondent's answer to that is two fold.

First and foremost, respondent is not seeking a reversal of a finding of fact. The determination that respondent's fault was 75% and petitioner's fault 25%, is not a finding

of fact; it is a conclusion from the evidentiary findings; and it is respondent's submission that the affirmed findings —"If the breakwater light had been operating the Captain would not have stranded the vessel" and that the light was not operating because of egregious negligence by the Coast Guard—inexorably dictate the conclusion that responsibility for the damage rests solely on the Coast Guard.

Secondly, we submit, if the apportionment be deemed a finding of fact, the error thereof is indeed "very obvious and exceptional".

(iv). Petitioner argues further that the Government is not liable for the Coast Guard's negligence because its duty is not "affirmatively to guide the mariner, but only the duty not to mislead him," whereas here, the Government's brief says, the knowledge that the light was not operating "negates any reliance".

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955), is cited in support of that argument. *That case, however,* is *contra:*

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

In the face of that holding, strange indeed is the petitioner's suggestion that the purpose of the Rockaway Point breakwater light was "not to guide the mariner but only . . . not to mislead him".

Stranger still is that contention in the face of the following admission in the Government's Answer (Appendix at p. 13):

> "Defendant, United States of America, . . .
>
> . . .
>
> "4. . . . admits that at the southerly end of the rock jetty at Rockaway Point, on the western end of the Rockaway Peninsula, in the Borough of Queens, City of New York, *a navigational light was maintained as an aid to navigation* by the United States Coast Guard, an agency of the United States, pursuant to authority vested in it by Chapter 5 of Title 14, U.S.C.A." (emphasis added).

III

The equal division rule, with its "major-minor" corollary, is logical, sound, just, equitable and practical—in any event, far more so than the urged substitute.

(i) The history of the equal division rule was fully known to this Court in 1882 when it decided the case of *The North Star*, 106 U. S. 17. That history is set forth therein at pages 21 *et seq.* A supplement thereto is contained in *The Max Morris*, 137 U. S. 1 (1890) at pp. 8-14.

In *The North Star*, the Court traced the lineage of the rule, its adoption by this Court in *Catherine* v. *Dickinson*, 17 How. 58 U. S.) 169 (1854) and its reiteration in subsequent cases. In point of fact, the rule had been adopted by this Court some years earlier in *Strout* v. *Foster*, 1 How. (42 U. S.) 89 (1843).

In 1890, the rule was again thoroughly reviewed in *The Max Morris, supra.* The opinion in that case notes 22 decisions by this Court in which the rule had been applied and extended (at pp. 8-11). It referred to and reviewed other cases (at pp. 12-14). Those cases, the opinion said, "show an amelioration of the common law rule, and an extension of admiralty rule in a direction which we think is manifestly just and proper" (at p. 14).

Since then, the equal division rule was reaffirmed and applied by this Court in *The Chattahoochee,* 173 U. S. 540 (1899); *The Eugene Moran,* 212 U. S. 466 (1909); *Weyerhauser Steamship Co.* v. *United States,* 372 U. S. 597, 603 (1963); *White Oak Transportation Co.* v. *Boston Canal Company,* 258 U. S. 341 (1922); *Cooper Stevedoring Co.* v. *Kopke Inc., supra,* 417 U. S. 106 (May 1974).

In the last mentioned case, this Court (at p. 110) took note of the "admiralty doctrine" of equal division of damages in cases of concurrent contributory fault and its "ancient lineage" dating back to "the 12th century". The rule, this Court observed, "has over the years been liberally extended" and (at pp. 110-111):

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties 'are both at fault they should bear the damage equally, to make them more careful.'
>
> *The Alabama, supra,* at 697."

We do not overlook that in a footnote (at p. 108), the Court noted that since the District Court had found the parties equally at fault there was "no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of the fault of the parties".

That explanatory observation or limitation, it seems to us, does not weaken the above quoted endorsement of the

historical adherence to and extension of the rule of equal liability for concurrent proximate causative fault, regardless of degree.

(ii) As recently as 1974, as pointed out at page 15, *supra*, in *Cooper Stevedoring* v. *Kopke*, *supra*, the "underlying rationales" of the existing rule were approved and this court said:

> "The interests of safety dictate that where two parties 'are both at fault they should bear the damage equally, to make them more careful.'"

Another rationale is the fairness and logic that where two (or more) parties have been causatively at fault, the *relative degree* of the parties' fault is *irrelevant* where the accident would not have occurred in the absence of either party's fault.

In those circumstances, the accident logically is equally attributable to both (or all) parties regardless of their respective degrees of fault—the more or less (whether 25% or less or 50% or more) in such cases is devoid of realistic consequence since without such fault (whatever its relative degree) the accident would not have occurred. Where the causation thus is joint, of what consequence are the exact proportions? Each party can truthfully say to the other: "If it were not for your negligence, the accident would not have occurred." That being the fact, is it not just and equitable that the consequent loss be borne equally regardless of the degrees of respective fault?

It may be speculated that it was such analysis and appraisal that resulted, at common law, in the rule that all whose negligence contributed to an accident are fully responsible to third parties injured by them but they *could not recover from each other* regardless of relative blame. There is logic in that point of view—so pervasive that it, too, has continued for centuries.

But that logic is stern and severe and works manifest injustice in situations where one of the negligent parties suffers no loss and the other suffers a heavy loss; the former escapes consequence for the mutually caused loss or damage and the latter suffers heavily even though the accident would not have happened in the absence of the former's negligence.

Admiralty, with more perception and less rigidity, conceived that in such circumstances, rather than denial of recovery to either of the mutual tortfeasors, it is more equitable and just to hold each party equally responsible to the other where the accident would not have occurred in the absence of negligence by both (or all where more than two), and, as at common law, both (or all) be held fully responsible to third parties.

Both rules, it should be noted, exclude the notion that greater equity would be achieved between mutual tortfeasors by pro-rating the damages on the basis of respective degrees of fault where (whatever the degree) there would have been no accident without it.

Moreover, such apportionment of causative fault on a percentage basis assumes a non-existent mathematical capability—a capability which the trial judge in this case acknowledged he did not possess when he said (20): "Allocation of proportionate fault is not capable of mathematical certainty, but the court's judgment is • • •."

Realistically, can a judge responsibly say 25% rather than 20% or 15% or rather than 30% or 35%? And should a trial court's percentage guess be protected, by the "unless clearly erroneous" rule which the Court of Appeals applied (10)?

The present rule is relatively simple and certain. The inquiry is limited to ascertaining, who, according to the evidence, is chargeable with significant contribution to the accident. An additional duty to assign percentages to

respective responsibility may be likened to requiring a pathologist who finds several concurrent proximate causes of death to say, with a reasonable degree of certainty, which among them was more causative than the other or others and the percentage degrees of difference.

(ii). The facts that the rule (a) is of ancient lineage (b), was adopted by the courts in this country from the time they commenced functioning (c), had been and was the law in Britain for many years before 1824 when it was officially recognized by the House of Lords (*Hay* v. *Le Neve,* Scots Appeals, Vol. 2, p. 395) (d) was adopted by this Court in 1843 (e), was reiterated in 1854 and (f) again in 1882 with an extensive review of the history and operation of the rule and (g) again thoroughly considered in 1890 and (h) since then has been extended by this Court as maritime liability successively was enlarged by acts of Congress—all these certainly are not arguments or considerations for the plenary abrogation of the rule by this Court.

Respect for the ancient and perennial, in our jurisprudence as in other phases of life, currently may not be as compelling as in other eras; nevertheless deliberative and deliberated change of a long established and consistently followed rule of law is not to be made because it does not prevail in other countries or because the rule is not to the liking of those who take a different view of what, in given circumstances, may seem more logical or more equitable.

That the equal division rule has been criticized by some eminent jurists and commentators, we respectfully suggest, is not persuasive. Dissent by judges, as well as lawyers and scholars, in regard to rules of law and their application, is not uncommon; and the views of the most eminent are not necessarily the sounder or the soundest.

More persuasive, we suggest, is the fact that the authors of the International Convention to which petitioner refers,

deemed it necessary to incorporate a provision that where "it is not possible to establish the degree of the respective faults", the "liability shall be apportioned equally". That is a recognition of the difficulty of attempting a mathematical apportionment of blame in any case of substantial concurrency of causation.

Still more persuasive is the fact that in the 64 years since the promulgation of that convention, Congress has failed to ratify it. Congress has not been reluctant to change maritime rules where it deemed change in the public interest. Its failure to act on the International Convention signifies at least grave doubt that the abandonment of the rule of equal division will promote justice. In the light of the abstention by Congress, the fact that other countries have adopted the convention is not a reason for this Court to set aside a rule which so long has continued to have the Court's endorsement.

IV

Congress, as the law making body, is the more, if not only, appropriate branch of government to determine whether the organic change petitioner seeks should be made.

Whether a rule of law fashioned by the courts, when met with substantial criticism and which has undergone change in other jurisdictions, should be altered by the courts or should await legislative action, is a much mooted question. Judicial amendment may be appropriate in areas of law in which there has been no legislative intervention. It is not appropriate, we submit, in areas in which Congress has legislated extensively.

In addition, especially inappropriate is the petitioned judicial amendment, since the proposal has been before Congress and Congress, after extensive hearing and debate,

has seen fit not to enact the propagandized change. In those circumstances, for the Court to adopt a change in law which Congress has seen fit to leave unchanged, would be especially inappropriate. Should the Court by a decision, after hearing only the two parties in a lawsuit, do what Congress has refused or abstained to do during the past 64 years after extensive hearing of all affected parties—either by Senate ratification of the Brussels Convention or by legislation?

Manifestly, the legislative process can hear and weigh the views of representatives of all who may be affected; and it is Congress, as the elected representative of the people, in whom the Constitution vests the primary power to make laws.

What was said by this Court in 1952 remains fully applicable:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit."

Halcyon Lines v. *Haenn Ship, Ceiling & Refitting Corp.*, 342 U.S. 282, 285-6 (1952).

Similarly, in *N. M. Patterson & Sons, Ltd.* v. *City of Chicago*, 324 F. 2d 254 (7th Cir. 1963), the court said (at pp. 257-8):

> "The claimed shortcoming of the rule are features inherent in it and have always coexisted with it. We are aware of no change in the nature or circumstances of the subject matter of its application which would justify its judicial rejection, or its restriction to mutual but equal fault cases, on the basis that it no longer serves to accomplish its original purpose. In our opinion the substitution of any alternative rule is a matter for congressional rather than judicial determination."

CONCLUSION

It is respectfully submitted that the case should be remanded with instructions to direct the increase of the judgment in favor of the plaintiff to the full amount of the plaintiff's damages, $108,446.66.

Respectfully submitted,

COPAL MINTZ
HERBERT B. HALBERG
Counsel for Respondent

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